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In the

United States Court of Appeals

For the Seventh Circuit

No. 12099

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GRANT W. SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.

Honorable
John P. Barnes,
Judge Presiding.

Appellant's Brief and Appendix

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. **GRANT W. SMITH,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois. — Honorable John P. Barnes, Judge Presiding.

Appellant's Brief

STATEMENT OF FACTS.

The March, 1957, Grand Jury returned an indictment against Grant Smith, defendant, in which he was charged in two counts with violation of Section 2422, Title 18, United States Code, commonly described as White Slave Act. Both counts are the same except that they relate to acts which occurred on two dates to-wit: January 31, 1957, and February 28, 1957. The indictment charges that Grant Smith, defendant, knowingly persuaded, induced, enticed and coerced a woman, one Mae Frances Young, also known

as Faye Jackson, to go from Chicago, Illinois, to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purposes, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce from Chicago, Illinois, to Waynesville, Missouri, in violation of Section 2422, Title 18, United States Code.

The defendant was tried by a jury and was found guilty of the charges contained in the indictment. The victim recanted her testimony in a sworn affidavit which was presented to the court on a motion for a new trial. The motion for a new trial was denied and the defendant was sentenced to the custody of the Attorney General for a period of five years.

Motion challenging the array.

A motion was made prior to the trial challenging the array of the petit jury. Roy Johnson, Clerk of the United States District Court testified that he selects one half of those chosen to serve as jurors; that fifty to sixty percent of all jurors he selected were either recommended by postmasters and former jurors or were volunteers (R. 52); and that some were recommended by the United States Attorney (R. 37). The balance of the jurors he selected were taken from lists of parents of pupils in a parochial school, a parent-teacher association list prepared by his wife, and a list submitted to him by his secretary (R. 48, 49). He further testified that during the year 1956 he communicated with only three Negro churches and some postmasters to secure names for jury service (R. 52). During the year 1957 up to the drawing of the panel for this case on May 15th, he wrote to only a few Negro organizations, mostly churches, to furnish him with names for jury service. (R. 58).

He estimated that he received several thousand questionnaires in 1956. He deposited in the jury box on May 9th, 1956, 606 names, on November 14th, 1956, 788 names; on April 8, 1957, 450 names and on May 8th, 1957, 514. On May 15th, 1957, when he drew the panel for the petit jury and the grand jury there were 1402 names in the jury box (R. 65).

Johnson denied that he excluded any one because of race, religion or class. In the past twenty five years he had written to churches of various religions, labor unions, veteran organizations, women's clubs, Rotaries, Elks, Lions and Odd Fellows. He testified that some answered his letter and some did not. (R. 28).

The motion for the challenge to the array was denied.

Testimony introduced on behalf of the Prosecution.

Mae Frances Norwood testified that she is also known as Faye Jackson and Louise Young, and that she had been convicted previously of the crime of the possession of narcotics and had been placed on probation. She first met the defendant in a tavern and when she met him again a couple of weeks later at the same tavern, she decided to become his girl friend (R. 103). The circumstances relating to her first trip to Waynesville on January 31st are described by her as follows: "I was talking to some girl friends of mine, and they were going and they asked me did I want to go along with them." (R. 105) She called the defendant and told him she wanted to go with her girl friend, Joanne. (R. 107). She testified that defendant said, "'It is O.K. with me,' if I wanted to go." (R. 108) She told him she did not have any money to go and he told her to come over to his house and get it (R. 109). She then went to his apartment and he gave her fifteen dollars (R. 110). She and two women known as Joanne and Bertha

boarded a train at the Illinois Central Station in Chicago and went to St. Louis. They then took a bus to Waynesville where she went to a place known as the Cactus Club and engaged in acts of prostitution from which she earned $219.00. She returned to Chicago and gave the defendant $195.00 of this money. (R. 113).

The circumstances concerning her second visit to Waynesville on February 28, 1957 are again related by her own testimony: "Well, he just told me, at least we both were talking about it, going back to Waynesville because he said there wasn't any money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he gave me money to go." (R. 114) The defendant gave her $20.00 and she bought a ticket at the Illinois Central Station and left for St. Louis. When she arrived there, she met two women known as Frances and Jackie. The three of them were driven by an acquaintance of one of them to Waynesville where they went to the Cactus Club. Again, she committed acts of prostitution from which she earned $175.00. She returned to St. Louis and called the defendant and had the following conversation with him: "I talked to Mr. Smith and told him that I was sending my money home, that I didn't want to take it in the hotel with me, that we were going to stay over, and I didn't want to take the money in the hotel with me, and I was going to send it home." (R. 120) She then sent him $100 by Western Union with the message, "I love you always." The complainant then took a bus back to Waynesville but when she found the police were about, she returned to St. Louis and from there she returned by train to Chicago.

On cross examination, she admitted that she had asked the defendant for money to go to Detroit (R. 129). She admitted defendant told her he wanted her to stop being a prostitute. She also admitted that he told her that he

did not like prostitutes and that as a result they got into a fight. He threw a bottle at her which cut her face and she became mad at him (R. 159).

Frances Norwood was recalled the next day for further cross examination. She denied that she telephoned the defendant after court adjourned the previous day. She also denied that she told him she had been threatened that if she did not testify against the defendant she would be sent to jail for five years. The following testimony was given (R. 236):

"Q. Was there any conversation as to what would happen to you if you didn't testify against Mr. Smith?

A. Well, when I was arrested, they told me I was under arrest because I didn't let them know where I were.

Q. Did Mr. Parrish tell you what would happen to you if you didn't testify against Mr. Smith?

A. He told me that I would be in contempt of court, or something, or perjury, or something.

Q. Did that convey to you the thought that if you didn't testify against Mr. Smith, that you might go to jail?

A. It did.

By Mr. Bellows: That is all.

By the Court: Was anything said about perjury?

By the Witness: He said I could have gotten five years for perjury since I didn't let him know where I were, or that I was intending to leave town. (R. 237)

By Mr. Bellows:

Q. You mean to say Mr. Parrish told you that because you didn't appear as a witness, you could be sentenced for five years for perjury?

A. It was something like that, yes.

Q. That frightened you, didn't it?

A. It did." (R. 237)

The prosecution called four women, Francis Mae Shipp (R. 161), Joan Bigham (R. 175), Geneva Washington (R.

199) and Frances Hamilton (R. 219) as witnesses. They testified that they went from Chicago to Waynesville and committed acts of prostitution and that they either went with complainant from Chicago, Illinois, to Waynesville or that they saw her in St. Louis, Missouri, or at the Cactus Club in Waynesville, Missouri.

Joan Bigham testified that on January 30, 1957, she saw Faye Jackson make a telephone call and that afterward Faye Jackson and Bertha and she drove in a cab to a building located at 5100 Ellis Avenue; that Jackson went in there and returned minutes later (R. 179). The witnesses, Shipp (R. 161), Washington (R. 139) and Hamilton (R. 219), testified that Faye Jackson sent money by telegraph.

Thomas W. Parrish testified that he is a special agent for the Federal Bureau of Investigation; that he took the defendant into custody on March 20th, 1957, and informed him of the charge against him; and that the defendant denied the charge and also stated that he did not know anyone by the name of Louise Young (R. 227)

Parrish was recalled by the government. He testified that he did not at any time tell the complainant that if she did not testify she would be put in jail for perjury.

On cross examination the following testimony was given:

* * *

"Q. Did you tell her what the effect would be of her refusing to testify against Mr. Smith?

A. No, sir, I didn't. (R. 238)

* * *

Q. Mr. Parrish, she told you at various times she didn't want to testify against Mr. Smith, isn't that right?

A. I have to think. I don't want to make a mistake. (R. 242)

* * *

A. She had told me that she didn't want to appear in court, yes, sir. (R. 242)

Q. Didn't you then tell her if she didn't appear in court and testify against Smith that she could be held for contempt of court?

A. I have already answered that, no, I told her, if I may answer, that if she did appear in court and did not tell the truth, she could possibly be held, not for contempt, but perjury." (R. 242)

On redirect examination by the government, the following took place:

"Q. Mr. Parrish, would you tell us, please, exactly what you did tell her.

A. I told her that if she took the stand that she should tell the truth regarding her association with the defendant in this case, because if she did not tell the truth, she would be subject to possible perjury charges and possible contempt of court." (R. 244).

Testimony on behalf of the Defendant.

Grant Smith, the defendant, testified that he was born in Montgomery, Alabama, and that he is 39 years of age. He had schooling equivalent to the ninth grade. He had worked as delivery boy, laborer, elevator operator, had owned a tavern and is now managing a tavern. Smith met Frances Norwood in December, 1956, at the Pershing Lounge. He met her for the second time three weeks later at the same place. He did not know at that time that she was a prostitute. The victim told him she had lived in Detroit, was married and had children. She also told him that she had been in trouble in Detroit on a narcotics charge and was on probation and had to go to Detroit to report. She said she had missed reporting the month of December and she needed $150 to straighten out the probation and he gave her $100. She left and was gone about a week but he did not know that she had gone to Waynesville, Missouri. She called him and told him she was not in town and that she was going to send him his money (R. 255).

The defendant did not know when Frances Norwood first called him that she was calling from out of the city. He denied that he told her at any time to go to Waynesville, Missouri, for the purpose of engaging in prostitution (R. 257).

While she was away in March, a man from Detroit inquired about her at the Lounge and he learned from him that she was a prostitute (R. 258). A few days later Smith talked to her about it while they were in the Lounge and she at first denied that she was a prostitute (R. 260). They then went to her home and while they were drinking, she admitted that she was a prostitute. Smith told her that he did not like prostitutes and that there was no future with her. She became angry and threw a whiskey glass at him and he threw a bottle at her (R. 261). He did not see her again until he saw her in court.

The defendant testified that he was called by his boss and told that an FBI agent was at the Lounge inquiring about him and Smith told him that he would be there about 3:00 o'clock. When Parrish arrived Smith identified himself and was placed under arrest. When he inquired why he was arrested he was told that he sent some girl to Missouri. He denied the charge. Parrish referred to the girl as Faye Jackson or Louise Young. The defendant stated he did not know Frances Norwood by any other name (R. 263).

The defendant denied that he at any time persuaded, enticed, induced, coerced, or assisted in inducing, persuading, enticing or coercing Frances Norwood to go to Missouri for the purpose of engaging in prostitution.

The defendant further stated that on the evening before the day he testified, Faye Jackson had telephoned him and said that she was sorry that she had testified against him

but she had been told that if she did not testify as she had, she would have been imprisoned for five years (R. 262).

On cross examination, he testified that he is the manager of the Pershing Lounge. He stated that he received a Western Union money-order but did not know that it was sent from Missouri. He received the money order either the same day or a day after he received the telephone call. He thought that she had gone to Michigan because she told him she was going there. The long distance operator did not talk to him. When he picked up the phone he asked her when she got back and she told him she was not in town (R. 266). He had a fight with Frances Norwood and threw a bottle at her which cut her.

At the hearing on the motion for a new trial, counsel for the defendant presented an affidavit made by the victim to the effect that after she had a fight with the defendant during which she was hurt and was sent to a hospital; she falsely accused the defendant of the charge that he sent her out of town in order to get even with him; that she later had a change of heart and eluded a police detail; that she was arrested and brought to the county jail at Rockford; but she did not know what she was charged with; that the bond of $5000 was high, she was not permitted to see a lawyer, write or call; that the agents for the FBI told her that if she did not cooperate with them that she would be sent to jail; that he had given her money to go to Detroit to see her children, but instead she had gone to Waynesville, Missouri; that her conscience bothered her; and that she is aware of the consequence of having given false testimony on the witness stand; and that no one made her change her testimony.

Counsel for the defendant offered to call the witness Frances Norwood in support of the statements made in the affidavit, but the court was of the opinion it was unnecessary.

SUMMARY OF ARGUMENT.

I.

The Clerk of the United States District Court testified that fifty to sixty percent of the persons he selected for jury services were either recommended by previous jurors and postmasters or were volunteers. The balance were selected from lists of private organizations consisting of a list of parents of students of a parochial school, lists prepared by the clerk's secretary and a list of a parent-teacher association prepared by the clerk's wife. The method employed by the clerk in selecting the jurors constituted a complete disregard of the requisite standards for the selection of jurors.

Volunteers for jury service are incompetent to serve as jurors under the laws of Illinois. Therefore they are incompetent to serve as jurors in the Federal Court under the provisions of Title 28, U.S.C. section 1861 (4) which provides that a person is incompetent to serve as a juror in a court of the United States if he is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held. The selection of jurors from lists of a few private organizations and those recommended by previous jurors, and in some cases by the United States Attorneys, deprived the defendant of being tried by a jury consisting of a true cross section of the population of this district. The selection of the jury by the means employed by the clerk violated the defendant's right to a fair and impartial jury guaranteed by the Sixth Amendment to the Constitution of the United States.

II.

The entire case against the defendant rests upon the testimony of the victim, an admitted prostitute, who had been previously convicted of a felony. She brought the charge that is the subject of this indictment after an altercation with the defendant in which she was cut by a whiskey bottle. When her conscience caused her to change her mind about testifying against him, she eluded a police detail. As a result of this she was arrested on a warrant charging her with being a material witness and she was confined in the county jail at Rockford, Illinois on a high bond of $5,000. She testified that while she was incarcerated there she was deprived of the right to communicate with a lawyer, write or make a telephone call. While in custody she was threatened by the agents of the F.B.I. if she did not cooperate with them.

She testified at the trial that she had made up her mind to go to Waynesville, Missouri and she called the defendant to tell him. He told her that if she wanted to go it was all right with him. Her testimony relating to the second trip to Waynesville, Missouri is to the effect that they both concluded it was a nice time to go to Waynesville, Missouri. There is absolutely no testimony that she was a prostitute for him nor is there any evidence that he persuaded or induced her to leave Chicago, Illinois and to go to Waynesville, Missouri. The evidence considered in a light most favorable to the government does not support a verdict of guilty.

III.

The United States Attorney failed to prove certain facts which he told the jury in his opening statement he would prove. He told the jury that the victim and the defendant

entered into an agreement whereby she would turn over her earnings from prostitution to him and in return he would provide for her wants. He also told the jury that the victim had given the defendant five thousand dollars of her earnings. None of these facts, as well as other assertions were proved at the trial. The United States Attorney in making these unproved statements, gave unsworn testimony which could not be erased from the jury's mind and thereby prejudiced the defendant's right to a fair trial.

IV.

The court erred in refusing to grant the defendant a new trial where it was shown by a sworn affidavit of the alleged victim that she committed perjury. The record in this case shows that within two days Frances Norwood came to counsel for defendant and told him that she had testified falsely. Counsel warned her of the possible consequences of her recantation and suggested she consult with her own attorney. A transcript of this conversation was given to the United States Attorney before the motion for a new trial.

Her recantation is understandable in view of the evidence that she had been held incommunicado at the Rockford County Jail for a number of months and had been subjected to pressure and threats by the FBI agents. When she was released and the influence was no longer brought to bear upon her, she renounced her testimony given at the trial at the earliest possible time.

CONTESTED ISSUES.

1. Whether the selection of the jury was such that it deprived the defendant of a trial by jury as guaranteed to him by the Sixth Amendment to the Constitution of the United States, where, at a hearing on a motion to challenge the array of the petit jurors, evidence was introduced that fifty to sixty percent of all petit jurors, selected by the Clerk of the United States District Court, were selected either on the recommendation of previous jurors and postmasters or were volunteers, and the rest were selected from a few private organizations.

2. Whether the evidence considered in a light most favorable to the government supports a verdict of guilty, where there is no evidence that the defendant persuaded, enticed, induced or coerced the victim to leave Chicago, Illinois, and go to Waynesville, Missouri, to commit acts of prostitution.

3. Whether the opening statement made by the United States Attorney containing matters which he stated he would prove, and did not, prejudiced the defendant's right to a fair and impartial trial.

4. Whether the court erred in refusing to grant the defendant a new trial where the victim's affidavit stated she gave material false testimony against the defendant.

PROPOSITIONS OF LAW RELIED UPON.

I.

The defendant was deprived of a jury selected from a truly representative group of the community as guaranteed to him by the Sixth Amendment to the Constitution of the United States because fifty to sixty percent of the jurors selected by the Clerk of the United States District Court were obtained from recommendations of previous jurors and postmasters or were volunteers and the balance were picked from a few particular private organizations.

Glasser v. United States, 315 U.S. 60.
United States v. Gordon, ... F. 2d ... (United States Court of Appeals for the Seventh Circuit, No. 11929, Opinion filed July 16, 1957).
Ballard v. United States, 329 U.S. 187.
Thiel v. *Southern Pacific Co.*, 328 U.S. 217.
Title 28, U.S.C. Secs. 1861-3-4.
Illinois Revised Statutes, 1955, Chap. 78, Sec. 1, 13.

II.

The evidence considered in a light most favorable to the government does not support a verdict of guilty where it appears from the record that the defendant did not persuade, induce, entice or coerce the victim to go from Chicago, Illinois to Waynesville, Missouri.

Welsch v. United States, 220 Fed. 764.
Batsell v. United States, 217 F. 2d 257.
U. S. v. Jamerson, 60 F. Supp. 281.
U. S. v. Mathison, 239 F. 2d 358.

III.

The United States Attorney in his opening statement prejudiced the jury against the defendant by relating facts which he did not prove in the trial of the case.

Minker v. *United States*, 85 F. 2d 425.

Manuel v. *United States*, 254 Fed. 272.

IV.

The court erred in refusing to grant the defendant a new trial where it was shown the government's witness committed perjury.

Martin v. *United States*, 17 F. 2d 973.

ARGUMENT.

I.

The defendant was deprived of a jury selected from a truly representative group of the community as guaranteed to him by the Sixth Amendment to the Constitution of the United States because fifty to sixty percent of the jurors selected by the Clerk of the United States District Court were obtained from recommendations of previous jurors and postmasters or were volunteers and the balance were picked from a few particular private organizations.

The affidavit in support of a motion challenging the array of the petit jurors stated (1) that 65% of the names of prospective jurors are obtained by recommendations of former jurors; (2) that Roy Johnson, Clerk of the United States District Court during the years 1954, 1955, 1956, did not address any communication to any person, corporation, or organization with reference to securing names of persons for jury service other than 3 churches and four small town postmasters; (3) that some of the prospective jurors whose names are deposited in the jury box were recommended by persons in the United States Attorneys office in this district; (4) that the array of petit jurors do not constitute a fair representative cross section of the community; (5) that the officials in charge of the jury selection procedure utilized methods in the selection of the petit jurors whereby they arbitrarily, intentionally or systematically excluded various classes of people who are eligible and qualified for general jury service; (6) that the officials in charge of the jury selection procedure of this court illegally and improperly delegated their duties in connection with the selection of the petit jurors; (7) that

the population of the Northern District of Illinois exceeds six million persons, but that since 1950 and at the present time, jury panels are selected from a list of prospective jurors never exceeding two thousand names. The government did not file an answer to this affidavit.

Roy Johnson was called as a witness by the defendant. He testified that fifty to sixty percent of all jurors he selected were either recommended by former jurors and postmasters, or were volunteers, and that the balance came from names furnished by friends in the building (obviously Federal Court Building), members of the United States Attorneys office, list of parents of students of a parochial school, lists given to him by his secretary, and, lists of members of parent teachers groups furnished by his wife (R. 49).

The testimony of Johnson shows an astonishing failure to keep adequate records concerning the selection of jurors. It was however shown that in 1956, the clerk communicated only with the pastors of three Negro churches and the postmasters of the district requesting them to furnish names of those desiring to serve as petit or grand jurors. During the year 1957 from January 1, 1957, to the date when the jurors were drawn for service for the month of June when this case was tried, the same procedure was followed as in the previous year. Only Negro organizations, mostly churches, were asked to send in names. Johnson said the jurors called in 1957 were selected in the same percentage as in 1956; that is 50 to 60% of the jurors were either recommended by other jurors or were volunteers. The limited field from which the clerk selected jurors is well demonstrated by Johnson's testimony that in 1956 he received forty to fifty names from Negro churches (R. 32), 100 to 200 names from postmasters (R. 36), 500 names recommended by other jurors (R. 37).

Although the clerk testified in response to questions asked of him by the court that in the past twenty five years he wrote to various organizations, not all such inquiries were answered (R. 28). The fact remains that in 1956 and 1957 he did not write to any organizations for names to be used for jury service. Furthermore we do not know when he made such requests or how many names he received. His testimony that he did not exclude any one because of race, religion or class is an unwarranted conclusion. The method by which he selected the jurors shows that he did in fact exclude from jury service the great majority of the population of the community.

The foregoing summary of the testimony given by the Clerk of the United States District Court shows an amazing disregard for the statutory requirements for the selection of jurors. Title 28, U.S.C. Sections 1861, 1863, 1864 provide the rules for the selection of jurors. These provisions provide that jurors selected must be competent to serve as a juror under the laws of the State in which the district court is held. In *Glasser* v. *U. S.*, 315 U.S. 60, 85, the court said:

> "Jurors in a federal court are to have the qualifications of those in the highest court of the State . . . the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class."

The jurors selected as volunteers were not competent to serve as jurors under the Statutes of Illinois. Chapter 78, Section 13 Illinois Revised Statutes provides that any person who seeks the position of a juror shall be deemed guilty of contempt and fined not exceeding twenty dollars.

Although the clerk in this district is a person of high integrity the method used by him to select jurors is

particularly evil in its possible effects. The selection of jurors by recommendation of previous jurors limits the choice of jurors from a little self-perpetuating group. In the hands of a clerk friendly to a litigant, the right to a fair and impartial jury is denied by the method of jury selection employed in this district. The selection by the clerk of jurors recommended by the personnel of the United States Attorneys office would procure a panel favoring the prosecution.

The startling disclosure by Johnson that in 1956 and 1957 he communicated with only three or four Negro churches and some postmasters in the district to obtain names for jury service, demonstrates the utter failure of the Clerk of the United States District Court to seek a group of jurors truly representative of the community. Forty per cent of the jurors were selected from a list of parents of pupils of a parochial school (R. 39), unidentified lists made by his secretary (R. 39), and lists of parent teachers groups furnished by his wife (R. 39). The selection of the jurors from recommendations of previous jurors, postmasters, volunteers and a few particular private organizations does not conform to the established concept of trial by jury.

In *Glasser* v. *U. S.*, 315 U.S. 60, 85, the court said:

> "*The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial.* No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be

countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

The standards to be employed for the selection of jurors stated in the *Glasser* case were reiterated in *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, and *Ballard* v. *U. S.*, 329 U.S. 187.

The use of lists of private organizations although condemned in the *Glasser* case has not been changed. It would thus appear that unless one belonged to a particular association favored by the clerk, or was recommended by a previous juror or postmaster, or volunteered for jury service, he would not be called. The clerk in following the methods we have called to the attention of this court excluded from jury service the overwhelming majority of the population.

II.

The evidence considered in a light most favorable to the government does not support a verdict of guilty where it appears from the record that the defendant did not persuade, induce, entice or coerce the victim to go from Chicago, Illinois to Waynesville, Missouri.

There is no probative evidence that the defendant persuaded, induced, enticed or coerced the complainant on two occasions to go from Chicago to Waynesville, Missouri. On January 31st, 1957, she decided to go to Missouri and merely called to tell the defendant of her intentions. He was perfectly indifferent to this and told her that if she wanted to go there it was all right with him.

Her testimony relating to her first journey to Waynesville, Missouri is as follows: "I was talking to some girl friends of mine, and they were going—and they asked me

did I want to go along with them and I said yes." (R. 105). She testified she called the defendant and the conversation was as follows, "I told him I wanted to go to Missouri with my girl friend, Joanne." (R. 107). He said, "'It is O.K. with me' if I wanted to go" (R. 108). The complainant testified that she told him she needed money to go there and he told her to come to his home and she went there and received twenty dollars.

The testimony of the complainant concerning the reason for her second trip also fails to sustain the charges contained in the second count. Her testimony concerning this trip is as follows: "We both were talking about it, going back down to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he said it would be all right for me to go by myself, and he give me money to go." (R. 114) Her explanation of the reason for her trip fails to satisfy the requirements of the provisions of the statute.

Evidence that the defendant received $100 on March 1, 1957 from the complainant's earnings from prostitution and $195.00 from her earnings on the previous occasion, which the defendant denied, would not of itself sustain a judgment of conviction if the defendant did not persuade, induce, entice or coerce the victim to travel from Chicago, Illinois, to Waynesville, Missouri to engage in prostitution. The intention that the complainant shall engage in prostitution must take place before the interstate journey is concluded. *Batsell* v. *United States*, 217 F. 2d 257; *United States* v. *Jamerson*, 60 F. Supp. 281; *United States* v. *Mathison*, 239 F. 2d 358.

This is indeed a strange white slave case where the alleged victim admitted that the defendant told her he did not like prostitutes and that he tried to dissuade her from being one (R. 158). Her testimony against the defendant must

be examined in the light of the evidence which discloses that she was motivated by a desire for revenge in instigating the prosecution. When she no longer desired to testify to a story she concocted she was coerced by the FBI agent, Parrish, who frightened her with the threat that she could be charged with perjury.

The victim testified she was arrested because she did not tell the authorities where she was (R. 236) and was taken to the county jail at Rockford, Illinois on April 10, 1957 and kept in custody until she testified on June 10, 1957. (R. 233). The following testimony brought out by counsel for the defendant on cross examination and by the interrogation of the court shows the influence brought to bear on this irresponsible witness, who not only admitted being a prostitute but had been previously convicted of a felony for possession of narcotics. (R. 236):

"Q. Did Mr. Parrish tell you what would happen to you if you didn't testify against Mr. Smith, that you might go to jail?

"A. He told me that I would be in contempt of court, or something, or perjury, or something.

"Q. Did that convey to you the thought that if you didn't testify against Mr. Smith, that you might go to jail?

"A. It did."

* * *

"By the Court: Was anything said about perjury?

"By the Witness: He said I could have gotten five years for perjury since I didn't let him know where (R. 237) I were, or that I was intending to leave town.

"By Mr. Bellows:

"Q. You mean to say Mr. Parrish told you that because you didn't appear as a witness, you could be sentenced for five years for perjury?

"A. It was something like that, yes.

"Q. That frightened you, didn't it?

"A. It did."

The following testimony of Parrish substantiates our view that he improperly influenced the witness.

R. 242

"By Mr. Bellows:

"Q. Didn't you then tell her if she didn't appear in court and testify against Smith that she could be held for contempt of court?

"A. I have already answered that, no. I told her, if I may answer, that if she did appear in court and did not tell the truth, she could possibly be held, not for contempt of court, but perjury.

R. 243

"By Mr. Connelly: (On Redirect Examination.)

"Q. Mr. Parrish, would you tell us, please, exactly what you did tell her?

• • •

R. 244

"By the Witness:

"A. I told her that if she took the stand that she should tell the truth regarding her association with the defendant in this case, because if she did not tell the truth, she would be subject to possible perjury charges and possible contempt of court."

We submit that it was not within the scope of the official duties of Parrish to implant in the mind of the witness that she could be charged with perjury, where there was no indication that she intended to testify falsely. The testimony of Parrish is not at all satisfactory. At one time he testified that he merely warned her of perjury and not of contempt (R. 243) and at another time he admitted that he warned her that she could be charged with perjury and contempt if she did not testify to the truth (R. 244).

The defendant testified that he is the manager of the Pershing Lounge, a tavern. He met the victim for the first time in December, 1956 at the Lounge. He met her again three weeks later at the same place. She told him

that she had lived in Detroit and that she was married and had children, and that she was attending a modeling school (R. 250). She also told him she had been in trouble in Detroit and had to go there every month to report. She told him she needed $150.00 to straighten out her probation but he only gave her $100.00 (R. 253). He saw her two weeks later and she said she was going to Detroit. While she was gone she called him by phone and told him she was not in town but she was going to send him some money. He did not know from where the money was sent. He denied that he sent her to Waynesville, Missouri to engage in prostitution. In March while she was away, he met some one from Detroit and learned that she was a prostitute (R. 259). When she returned he questioned her about it. At first she denied that she was a prostitute and then she finally admitted it. He told her that he did not like prostitutes and that he saw no future with her (R. 261). An argument followed in which she threw a whiskey glass at him and he threw a bottle at her, cutting her. She said she would get even with him. The defendant denied that he ever persuaded, induced, enticed or coerced the complainant to go to Waynesville, Missouri (R. 263).

The recantation of the victim supports our contention that the defendant was the victim of false testimony given by a woman, admittedly a prostitute and previously convicted of a felony, who was seeking revenge for being injured in an altercation. While it may be true that a witness may be influenced into recantation of testimony previously given, the circumstances in our present case indicates strongly that she gave false testimony at the trial because she was frightened by the threats of Parrish.

She was kept in the Rockford Jail on warrant as a material witness from April 15th to June 10th. The bond was too high for her to make and she was not permitted to call, write or obtain a lawyer. (R. 79). Although Parrish

testified he told her they were keeping her there for her own good, she was released immediately after she testified. (R. 233). The victim testified that she was told by Parrish that if she did not testify she would get five years for perjury, and that she was frightened as a result of that (R. 155). Her testimony on that matter is corroborated by Parrish, the FBI agent, who testified that he warned her if she did not tell the truth she could be punished for perjury and contempt. (R. 163).

Within two days after the return of the verdict, the complainant came to office of counsel for the defendant and told him she gave false testimony at the trial. Counsel informed her that if she testified falsely she could be punished and advised her to consult with her lawyer. Thereafter, the complainant consulted a lawyer and made an affidavit to the effect that she had a fight with Grant Smith and he hurt her and she went to the Cook County Hospital; that while there agents of the FBI visited her and she falsely told them that she had been a prostitute for Grant Smith and that he had sent her out of town; that she made the statement because she was angry with him and wanted to get even; that she had a change of heart after making the statement and she eluded the police detail; that on April 15th she was arrested and brought to Rockford, Illinois, and placed in jail under a $5,000 bond; that she did not know what she was charged with; that she was not permitted to see a lawyer, write or call; that the agents of the FBI told her how much time she would get if she did not cooperate with them; that the statements she made against Grant Smith were not true; that he had given her money to go to Detroit to see her children, and instead she went to Waynesville, Missouri; that she has been bothered by her conscience and that no one has talked to her to change her testimony and that she is aware of the consequences of lying on the witness stand.

Even if the court were to exclude from consideration the affidavit of recantation in determining the weight of the evidence, there is nothing in the words or conduct of the defendant which resembles that persuasion and inducement which constitutes a violation of the provisions of the statute. The conduct of the defendant was plainly one of indifference as to whether or not the victim went to Waynesville, Missouri. In *Welsch* v. *United States*, 220 Fed. 764, the court stated the test as to the sufficiency of the evidence in a prosecution under this statute is as follows:

> "To justify his conviction we think it was necessary to show that except for his express desire and inducement she would not have made the journey."

III.

The United States Attorney in his opening statement prejudiced the jury against the defendant by relating facts which he did not prove in the trial of the case.

It is our contention that the United States Attorney committed prejudicial error in making an opening statement wherein he informed the jury that he would prove certain facts, but failed to introduce any evidence concerning those matters.

The following unproved assertions were made:

> "The defendant and she decided that she would go to work for Mr. Smith, that she would turn over her earnings of prostitution, prostitution earnings to Mr. Smith in exchange for which he would furnish her with an apartment and clothes, and all the necessaries she might need." (R. 90).
>
> "The evidence will further show during the course of this relationship between Faye Jackson and the defendant extending from the late summer of 1956 until about March of this year, that she turned over to

him earnings in the amount of approximately $5000.00" (R. 90).

"She made a telephone call from that restaurant and talked to the defendant and asked his permission to go. The evidence will show that he told her she might as well go down there because she wasn't making any money here, and that to come by his house and he would give her the train fare."

"The evidence will further show that he talked on the phone at that time, at the same time, to another one of the girls who had told her about this good business down in Waynesville, Missouri." (R. 91).

"The government expects further that the evidence will show that on or about February 28th the defendant and the victim Faye Jackson, had another conversation in which he told her it was about time to go back to Waynesville, since it was the end of the month and soldiers were going to get paid, that this time she should stay three days, and that if she stayed three days she could come back with $600.00" (R. 93).

"The evidence will further show that Miss Jackson, she called Chicago on long distance and talked to the defendant. The defendant told her she had better send the money home, at least some of it, because it was not safe to leave it around the hotel room; someone might break into the hotel room and take the money." (R. 95).

The prosecutor had interviewed the victim several times (R. 133, 134) and should have known that she would not testify to the facts that we have hereinabove set forth. He did not show that he was taken by surprise by the failure of the victim to relate the matters he said he would prove. Had the witness given testimony different from what he expected he would have made an effort to bring out those facts by refreshing her recollection.

There was no evidence in the record that the defendant and the victim agreed that she would go to work for him

and turn over her earnings as a prostitute to him. There was no evidence in the record that she would turn over her earnings from prostitution in exchange for which he would furnish her with an apartment and clothes and all the necessaries she might need. There was no evidence that she turned over five thousand dollars to him as her earnings. There was no evidence that he told her that she wasn't making any money here and she might as well go to Waynesville. There was no evidence that he talked to one of the girls on the phone at the same time. There was no evidence in the case that he told her on or about February 28th, that if she stayed three days in Waynesville she could come back with six hundred dollars. There is no evidence that the defendant told her on the telephone to send the money back home.

The jury in this case could not easily forget the statements made by the prosecutor. Having heard it, it was before them for consideration in passing judgment on the defendant. The average juror has a great deal of respect and confidence in the United States Attorney and consequently when the jury is informed of evidence he intends to prove, they are apt to consider the statements as proven. Jurors untrained in the law are not likely to discern a distinction between statements made by the United States Attorney relating to evidence he intended to introduce and the actual evidence admitted at the trial. Consequently, what the government was lacking in evidence, was supplied by the United States Attorney in his opening statement.

It is often said and often forgotten that the duty of a prosecuting attorney is not to convict a defendant but to try him fairly. The prosecutor should hold himself to the highest practicable standard of fairness. In this case he failed to do so by relating facts to the jury in the

opening statement that he should have known he would not be able to prove. An improper and prejudicial opening address by the United States Attorney may justify a reversal of the judgment of conviction. *Minker* v. *United States*, 85 F. (2d) 425; *Manuel* v. *United States*, 254 F. 272.

IV.

The court erred in refusing to grant the defendant a new trial where it was shown that the government's witness committed perjury.

At the hearing on the motion for a new trial, counsel presented an affidavit made by Frances Norwood in the presence of her attorney to the effect that she testified falsely at the trial that the defendant sent her to Waynesville, Missouri (R. 79, 80). Counsel offered to call Frances Norwood to testify concerning her affidavit but the court refused to hear her stating, "I assume she would say the same thing if she were on the stand." (R. 374). The circumstances surrounding the making of this affidavit show clearly that the witness made it voluntarily. She came to counsel for defendant within two days after the verdict and informed him she testified falsely at the trial. He informed her that the consequences of such recantation might result in her being charged with perjury or contempt of court and suggested she see her own counsel (R. 374). She went to an attorney, Matt Moran and in the presence of two witnesses made the affidavit. In view of her sworn affidavit in which she admitted that she testified falsely, the court erred in not granting the defendant a new trial.

In *Martin* v. *United States*, 17 F. 2d 973, the court said:

> "In our opinion it is the duty of a trial court to grant a new trial, where a witness at the original trial

subsequently admits on oath that he committed perjury, or even that he was mistaken in his testimony, provided such testimony related to a material issue, and was not merely cumulative. *Bussey* v. *State*, 69 Ark. 545, 64 S.W. 268; *State* v. *Mounkes*, 91 Kan. 653, 138 P. 410, 51 L.R.A. (N.S.) 286."

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the judgment and conviction of the defendant, Grant W. Smith, be reversed.

CHARLES A. BELLOWS
AND
JASON ERNEST BELLOWS
Attorneys for Defendant-Appellant.

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Appellant's Appendix

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 57 CR 212) • •

PREFIX TO RECORD PURSUANT TO RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. Names of Parties:
   United States of America, plaintiff-appellee Grant W. Smith, defendant-appellant
2. Date of Filing of Indictment:
   March 28, 1957
3. Date of Issuance of Bench Warrant:
   March 28, 1957
4. Date of filing of Bench Warrant Returned Executed:
   April 26, 1957
5. Date of filing of Appearance Bond in sum of $5,000:
   April 30, 1957
6. Date of Commencement of Trial:
   June 10, 1957
7. Name of Judge Presiding:
   Honorable John P. Barnes
8. Verdict of Jury:
   We, the Jury, find the defendant, Grant W. Smith, guilty as charged in the indictment.
9. Date Sentence Imposed:
   June 27, 1957

10. Date of filing of Appeal Bond in sum of $5,000:
June 27, 1957

11. Date of filing of Notice of Appeal:
June 28, 1957

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57 CR 212) * *

CRIMINAL DOCKET.

3-28-57 Filed Indictment

3-28-57 Bench warrant to issue and bond fixed at $5,000.00 —Barnes, J.

3-28-57 Issued bench warrant with copy of Indictment att.

4-22-57 Filed Affidavit.

4-22-57 Order bench warrant to issue for Louise Young, also known as Faye Jackson, a material witness in the above cause.—Draft—Barnes, J.
Mld ntcs. 4-23-57 (U.S. Atty.)

4-22-57 Issued B.W. to U. S. Marshal.

4-26-57 Order bond for material witness Faye Jackson, also known as Louise Young, is fixed at $5,000.00. —Barnes, J.
Mld ntcs. 4-29-57 (U.S. Atty.)

4-26-57 Filed B.W. ret'd. executed.

4-30-57 Filed Appearance Bond—$5,000.00

4-30-57 Deft with counsel waives reading of indictment & pleads not guilty. Cause set for trial June 10, 1957. Head of call.—Barnes, J.
Mld ntcs. 5-1-57 (U.S. Atty.)

5- 1-57 Filed B.W. retd executed.

5-20-57 Filed three (3) Subpoenas retd served.

5-20-57 Filed Subpoena Duces Tecum retd served.

5-31-57 Filed Subpoena retd served.—1 service

6- 3-57 Filed Appearance of Deft & Attys.

6-10-57 Filed 2 subpoenas retd served

6-10-57 Filed Notice and Affidavit

6-10-57 Cause called for trial. Motion of Chas. A. Bellows, Atty for deft, challenging the array of petit jurors is disallowed. Jury selected and sworn. Two alternates. On motion deft witnesses excluded. Opening statement hrd for Govt. Deft waives opening statement. Evidence heard in part for Govt. On motion Govt Louis Young, also known as Faye Jackson, a material witness in above cause is discharged from custody. Further evidence heard for Govt. Jury to separate until June 11, 1957 at 10:30 A.M.—Barnes, J.
Mld ntes 6-11-57

6-11-57 Filed Verdict

6-11-57 Further evidence hrd for Govt & Govt rests. Motion of deft for a judg. of acquittal at close of Govt's case is denied. Evid hrd for deft and deft rests. Govt rests. Both sides rest. Motion of deft for a judg of acquittal at close of all the evid is denied. Final argmts hrd and concluded. Court instructs the jury. Marshals sworn. Alternate jurors No. 1 and 2 discharged from further service in this cause. Jury retires to consider of its verdict. Jury returns verdict in open Court. Verdict read. Deft waives polling of jury. Enter

verdict: "We, the Jury, find the deft Grant W. Smith guilty as charged in the indictment." Cause continued to June 21, 1957 at 10 A.M. for hearing on motion for new trial and for dispsn. Deft's present bond to stand—Barnes, J.
Mld ntcs 6-11-57

6-11-57 Filed Instructions to Jury.

6-12-57 Filed Three (3) Witness Attendance Certificates.

6- 3-57 Fld appearance of Attorneys for deft.

6-13-57 Filed Subpoena retd unexecuted.

6-14-57 Filed Motion for a new trial

6-21-57 On mot deft ord cs contd for hrg on mot for a new tr & dispn to June 27, 1957 at 10 A.M.—Barnes, J.
Mld ntcs. 6-26-57 (Attys. & U.S. Atty.)

6-21-57 Clerk's File Copy of Transcript of Proceedings had before Judge Barnes (prior to Opening of the Trial of said cs) on June 10, 1957 filed by Official Court Reporter.

6-21-57 Clerk's File Copy of Transcript of Proceedings had before Judge Barnes on June 10, 1957 filed by Official Court Reporter.

6-27-57 Filed Supplementary Motions for new trial with Affidavit in Support

6-27-57 Arguments heard and concluded. Order motion for a new trial and supplementary motion for a new trial overruled and denied. Order defendant committed for 5 years on count 1 and defendant committed for 5 years on count 2, said sentences

to run concurrently—On motion defendant bail pending appeal fixed at $5000.00—Draft—Barnes, J.

Mailed notice to Attys. 6-28-57

6-27-57 Issued c.c. of order and comm. and copy to U.S. Marshal

6-27-57 Filed Appeal Bond $5,000.00

6-28-57 Filed Notice of Appeal of Defendant

6-28-57 Mailed copy of notice of appeal to U.S. Atty., U.S. Marshal and copy with statement of docket entries to U.S.C.A., 7th Circuit

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57 CR 212) * *

The March 1957 Grand Jury charges:

That on or about January 31, 1957, in the City of Chicago, in the Northern District of Illinois, Eastern Division,

Grant W. Smith,

defendant, knowingly persuaded, induced, enticed and coerced a woman, to wit, one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purpose, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce, to wit, from Chicago, Illinois to Waynesville, Missouri; in violation of Section 2422, Title 18, United States Code.

COUNT TWO.

The March 1957 Grand Jury further charges:

That on or about February 28, 1957, in the City of Chicago, in the Northern District of Illinois, Eastern Division,

Grant W. Smith,

defendant, knowingly persuaded, induced, enticed and coerced a woman, to wit, one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purpose, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce, to wit, from Chicago, Illinois to Waynesville, Missouri: in violation of Section 2422, Title 18, United States Code.

A True Bill:

.....

Foreman

.....

United States Attorney

DAC:ms

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57 CR 212) * *

AFFIDAVIT OF CHARLES A. BELLOWS IN SUPPORT OF MOTION CHALLENGING THE ARRAY OF PETIT JURORS.

Charles A. Bellows being first duly sworn, deposes and says as follows:

1. That he is the attorney for defendant, Grant W. Smith, and duly authorized agent of said defendant in this behalf.

2. That he was counsel in a certain case formerly pending in this district entitled United States of America *vs.* Daniel Considine, et al., number 54 CR 585, and that as such counsel he participated in a hearing relating to a motion to challenge the array of the petit jury in which Roy H. Johnson, Clerk of this Court and *ex-officio* Jury Commissioner for the Northern District of Illinois, testified in relation to the jury selection procedures in said district, and that the said witness on that occasion testified to the following matters:

(a) That during the years 1954, 1955 and 1956, said witness did not address any communications to any person, corporation or organization with reference to jury service other than three (3) churches and four (4) small town postmasters.

(b) That during the years 1950 to 1957 said witness obtained only eight short lists of prospective jurors, containing in all not less than 1000 names, and that the only other sources of prospective jurors during that period were former jurors, persons recommended by former jurors and volunteers.

(c) That during the period from 1942 to 1957, said witness has never overhauled the jury box from which jury panels are selected, and that said witness is unable to state definitely that there are no cards for prospective jurors in the jury box as much as fifteen years old since the box has never been emptied during that period.

(d) That the said witness was unable to state whether lists of prospective jurors as much as twenty years old were still in use in his office.

(e) That upwards of 50% of the names of prospective jurors are obtained by the said witness from membership lists of private organizations selected by the said witness and that 75% of said membership lists currently in use are in excess of seven years old.

(f) That some of the prospective jurors whose names are deposited in the jury box were recommended by persons in the United States Attorney's office in this district.

(g) That upwards of 65% of the names of prospective jurors are obtained by recommendations of former jurors, which former jurors were solely selected under a system of accepting recommendations from the officers of certain selected private organizations.

(h) That other than accepting the names of volunteers and using membership lists hereinabove referred to, the said witness during the period 1942 to 1957, utilized no method whereby he could obtain the names of prospective jurors who had not previously served as juror or been recommended by persons who had so served.

(i) That all prospective jurors fill out questionnaires and that the names of those of the prospective jurors who are to be placed in the jury box are selected by the said witness on the basis of information contained in those questionnaires according to the discretion of the person who is to deposit those names in the jury box.

(j) That said witness was unable to state the age of the oldest questionnaire completed by a prospective juror in his files.

(k) That the system of selecting prospective jurors in this district has continued unchanged since 1924.

3. That a hearing on this motion will disclose the following:

(a) The array of petit jurors do not constitute a fair and representative cross section of the community.

(b) The officials in charge of the jury selection procedures of this court utilized methods in the selection of the petit jurors whereby they arbitrarily, intentionally or systematically excluded various classes of people residing

within the jurisdiction of this court who are eligible and qualified for general jury service.

(c) The officials in charge of the jury selection procedures of this court utilized methods in the selection of the petit jurors whereby discrimination was practiced against various classes of people who are eligible and qualified for general jury service.

(d) The officials in charge of the jury selection procedures of this court illegally and improperly delegated their duties in connection with the selection of the petit jurors.

(e) That by virtue of the jury selection procedures now employed in the Northern District of Illinois, there is exercised a systematic and arbitrary exclusion of all persons not members of certain favored private organizations.

(f) That the population of the Northern District of Illinois exceeds six million (6,000,000) persons, but that since 1950 and at the present time, jury panels are selected from a list of prospective jurors never exceeding two thousand (2,000) names.

(g) That no effort is made by the Jury Commissioners of the Northern District of Illinois to select jurors from any list thoroughly representative of the total population of the said district, such as, telephone directories, voter lists or the like, but that rather effort is simply to retain the services of the same small group of juries augmenting their number when necessary by names of persons submitted by previous jurors and the officers of certain favored private organizations.

(h) That the jury selection procedures of the Northern District of Illinois have not, in any respect, changed or been modified since the decision of the Supreme Court of the United States in the case of Glasser vs. United States, 315 U.S. 60, 86 L. Ed. 680, (1941)

4. That affiant believes that if granted a hearing in reference to the jury selection procedures in this district, he can produce other and further evidence in support of the motion to challenge the array of the petit jurors, and that upon a hearing on said motion to challenge the array this court will sustain this motion.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57 CR 212) * *

This cause coming on for hearing on the defendant's motion for a new trial and for disposition comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the Court having heard the arguments of counsel and being fully advised in the premises it is

ORDERED that the defendant's motion for a new trial and his supplementary motion for a new trial be and they are hereby overruled and denied and the defendant being asked by the Court if he has anything to say why sentence and judgment of the Court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore considered and

ORDERED AND ADJUDGED by the Court and is the sentence and judgment of the Court upon the verdict of guilty heretofore rendered herein that the defendant Grant W. Smith be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Five (5) Years on Count 1 of the Indictment and that he be and is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Five (5) Years on Count 2 of said Indictment, that said sentences shall run concurrently and on motion of the defendant it is

ORDERED that bail pending appeal be and the same is hereby fixed at Five Thousand Dollars ($5,000.00).

John P. Barnes
United States District Judge

June 27, 1957.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 57 CR 212) * *

NOTICE OF APPEAL

Name and Address of Appellant:
Grant W. Smith
5100 South Ellis Avenue
Chicago, Illinois

Name and Address of Appellant's Attorneys
Charles A. Bellows
and
Jason Ernest Bellows
10 South La Salle Street
Chicago 3, Illinois

Offense:
Violation of Section 2422,
Title 18, United States Code

Judgment of guilty and order denying motion for new trial entered June 27, 1957, appellant sentenced to the custody of the Attorney General for a term of five years.

Grant W. Smith, Appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Dated: June 28, 1957.

Grant W. Smith
Appellant
By Charles A. Bellows
and
Jason Ernest Bellows
Attorneys for Appellant

RECEIVED copy of above Notice of Appeal this 28th day of June, 1957.

By Robert Tieken
United States Attorney

ABSTRACT OF THE EVIDENCE

Testimony given at the hearing on the motion for the challenge to the array of the petit jurors.

Roy Johnson, Clerk of the United States District Court, testified at the hearing on the motion challenging the array of the petit jury. The other jury commissioner, Harry Crooks, was ill and did not testify. Johnson testified that he and Crooks placed in the jury box an equal number of names of prospective jurors (R. 40). During the year, 1956, the only requests he made for names was directed to three or four negro churches and some postmasters of the district (R. 24). He received forty or fifty names from the negro churches (R. 30), one hundred to two hundred names from the postmasters (R. 36), and perhaps five hundred names of persons recommended by previous jurors (R. 37). He also obtained names from a list of St. Kilian Society brought in by a deputy clerk, a list of parents of pupils in a parochial school, lists given to him by his secretary, and lists furnished by his wife of parent teachers associations (R. 49).

Johnson testified that he received several thousand questionnaires during the year, 1956, but did not know exactly how many. In 1956, there were deposited in the jury box 1934 names. On April 8, 1957, and on May 8, 1957, there were deposited 450 and 514 names respectively. At the time he drew the panel for the petit jurors for the month of June, he also drew the grand jury panel. There were only 1402 names in the box at the time he made the drawings in June.

Johnson further testified that fifty to sixty per cent of all jurors names be deposited in the jury box were taken

from names recommended by other jurors or by friends, people around the building, and volunteers (R. 51, 52). He testified that three jurors were recommended by the members of the United States Attorneys office, two of them during 1957 (R. 52, 53).

Johnson testified that in 1957, he employed the same means to select jurors. He wrote to more negro organizations, mostly churches. The jurors selected to serve for the month of June were drawn on May 15, 1957, and they came from the same source that he had described for the year, 1956. He did not write to churches containing white membership (R. 60). He did not know whether he wrote to any postmasters for names from January 1st 1957 to May 15th, 1957. The names of jurors drawn to serve for the month of June, 1957, were drawn from the names he had deposited as his half of the total number (R. 62). Fifty to sixty per cent of the names he deposited were persons recommended by other jurors and volunteers.

On cross examination, he testified that he did not systematically or intentionally exclude any economic, social, religious, racial, political, or geographical group. He did say, however, that he did not have sufficient clerical help to take names from polling lists and directories (R. 66A).

Roy Johnson, under the questioning of the court, testified that over the past twenty five years, as Clerk of the United States District Court, he had written to Catholic, Jewish and Protestant Churches, labor unions, veteran organizations, parent teacher associations, women's clubs, rotaries, Lions, Elks and Odd Fellows. He has always written to postmasters in the outlying counties. He had also written to officers of labor unions. When he was asked whether he had received answers, he made the following reply:

"Well, over the years I have had answers from some of all of those organizations. That is, some of the labor unions, some of the pastors answered. There are some who don't answer. I don't write again. I write once, and if they don't answer, that is it, except the Chicago Urban League. I have written to them several times.

He testified also that he did not exclude any religious sect, race or class as regards wealth or education.

The Court, at the conclusion of the hearing, overruled the motion challenging the array.

TESTIMONY INTRODUCED ON BEHALF OF THE PROSECUTION.

98 Mae Frances Norwood testified that she is aiso known as Faye Jackson and Louise Young, and that she had been convicted previously of the crime of possession of narcotics and had been placed on probation for a period of two years. She met the defendant several months ago at the Pershing Hotel. She testified that a couple of weeks later they met again at which time she decided to
103 be his girl friend. The defendant asked her who her boy friend was and she replied she did not have one. They had some drinks together. She testified that it happened a long time ago and she did not recall exactly what they said to each other. She became his girl friend for four or five months. She testified that on January 30, she took a trip to Waynesville, Missouri. She was asked by the prosecutor how she happened to go to Missouri. The
105 witness replied, "I was talking to some girl friends of mine, and they were going and they asked me did I want to go along with them". (R. 105) She called the defendant and told him she wanted to go to Missouri with her girl friend, Joanne (R. 107). The defendant said, "It is O.K. with me," if she wanted to go. (R. 108).
109 The witness told him she did not have any money to go and he told her to come over to his house and get it (R. 109). She went to his apartment and he gave her fifteen dollars (R. 110). The witness and two other women known as Joanne and Bertha boarded a train at the Illinois Central Station in Chicago and went to St. Louis (R. 110). They then took a bus to Waynesville where she went to a place known as the Cactus club. That night she com-

mitted acts of prostitution from which she earned $219.00. She returned to Chicago the next day and gave the defendant $195.00 of this money (R. 113).

113 On February 27, 1957, she had a conversation with the defendant as follows: "Well, he just told me, at least we both were talking about it, going back down to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go, and I didn't want to go by 114 myself, and he said it would be all right for me to go by myself, and he give me money to go." (R. 114). The defendant gave her $20.00 and she bought a ticket at the Illinois Central Railroad Station and left for St. Louis at 11:30 P.M. When she arrived there the next morning, she went to the bus station and found she missed the bus. She met Bertha and another woman and went to a tavern and had some drinks. Some acquaintances of Bertha drove them to Waynesville and again they went to the Cactus club where she met two women, Frances and Jackie. The witness committed acts of prostitution from which she earned $175.00. She returned to St. Louis and called the defendant on the phone and related the following conversation: "I talked to Mr. Smith and told him that I was sending my money home, that I didn't want to take it in the hotel with me, that we were going to stay over, and I didn't want to take the money in the hotel with me, and I was going to send it home. She sent him $100 with the 120 message "I love you always." (R. 120). She and two women companions, Joanne and Jackie, took a taxicab to Waynesville. Something had occurred and the police were about so they returned to St. Louis and took an Illinois Central train to Chicago. Upon her return, she spoke to the defendant in her apartment. She was asked what each said and she said, "Well, we just talked on a number of things. I can't tell just what all we did say." (R. 124) When asked again if she recalled any of the conversation, she testified, "We talked about what happened down there. I told him what had happened, and we were talking about

things wasn't as nice as before when I went." When asked again if she could recall anything else of the conversation, she said, "I don't."

126 On cross examination, she testified that her conviction for a felony occurred in Detroit, Michigan. She admitted she had asked the defendant for money to go to Detroit. (R. 129). When she met the defendant at the Pershing Lounge she had been drinking. She testified that the defendant tried to stop her from being a prostitute (R. 149) and asked her to become a shop lifter, (R. 151) and that as a result of that they had a fight (R. 151). At the time he told her that he wanted her to stop being a prostitute, they were both drinking at the Pershing Lounge. She said that she might have had as much as 20 drinks and that she was "high" and intoxicated. They then went to her apartment and he sent out for liquor. They got into a fight when the defendant told her he didn't like a prostitute, and he threw a bottle at her which cut her face. She admitted that she was mad at him (R. 159).

161 Francis Mae Shipp testified that she is a prostitute; that she met Faye Jackson at the Cactus Club on February 28, 1957; (R. 163) that she and Faye Jackson returned by bus to St. Louis where she sent a money order (R. 165).

175 Joan Bigham testified that she had been previously convicted of a felony, is a prostitute and that she knows Faye Jackson; that she did not know the defendant personally; (R. 176) that she saw Faye Jackson on or about January 30, 1957, at the Clover Club in Chicago; that another woman by the name of Bertha was there; that she saw Faye Jackson make a telephone call; that they then left in a cab and went to a building located at 5100 Ellis Avenue (R. 178) where Faye Jackson entered and returned ten minutes later; that they boarded a train at Illinois Central Station bound for St. Louis (R. 181).

When they arrived there they took a bus to Waynesville, Missouri, where they went to the Cactus Club and committed acts of prostitution (R. 185). The next day she returned to Chicago. On February 27, 1957, she went to St. Louis on the Illinois Central with Frances Shipp, Frances Hamilton and Jackie Phillips (R. 187). From St. Louis they went : Waynesville, Missouri by bus. She engaged that night in acts of prostitution at the Cactus Club. (R. 189). They returned to Chicago the next day.

199 Geneva Washington also known as Jackie Phillips testified that she is a prostitute. On February 27, 1957, she took the Illinois Central train to St. Louis. On the train she met Joanne, Frances Shipp and Frances Hamilton. After they arrived in St. Louis they took a bus to Waynesville, Missouri, and went to the Cactus Club where she met Faye Jackson, otherwise known as Louise Young (R. 201). When she finished work that night, she went back to Waynesville and there met Faye Jackson. They took a bus back to St. Louis. She saw Faye Jackson send a money order for $100 (R. 204). They went back to Waynesville by cab. After they finished work they went back to St. Louis and took a train back to Chicago. She testified she had been convicted of shoplifting.

214 By stipulation it was agreed that a Western Union Money Order dated March 1, 1957, issued to Grant Smith in the sum of $100 was telegraphed from St. Louis, Missouri, on March 1st, 1957, and was received by, endorsed by and deposited by the defendant, Grant Smith (R. 213, 214).

219 Frances Hamilton, otherwise known as Holliday, testified that she is a prostitute; that she met Faye Jackson on March 1st on a bus going from Waynesville to St. Louis; (R. 220) that on the bus were Jackie Phillips and Frances Shipp. When they arrived in St. Louis, Faye

Jackson sent a telegram and handed the Clerk some money; (R. 221) that they returned to the Cactus Club at Waynesville and engaged in acts of prostitution; and that evening they took the train back to Chicago (R. 224).

226 Thomas W. Parrish, a special agent for the Federal Bureau of Investigation testified that he arrested the defendant who denied the charge and said he did not know anyone by the name of Jackson or Louise Young (R. 227).

230 Frances Norwood also known as Faye Jackson or Louise Young, was recalled for further cross examination. She testified that she did not call the defendant after court adjourned to tell him that she had been threatened that if she did not testify against the defendant she would be sent to jail for five years (R. 233). At first, she denied that she had been discharged from custody (R. 233). Then she admitted that an order was entered discharging her from custody. She said she was arrested because she did not let them know where she was. She testified that Mr. Parrish told her that if she did not testify against the defendant she would be in contempt of court, or something, or perjury (R. 236). She thought Mr. Parrish meant that she might go to jail if she did not testify against the defendant (R. 236).

236 The court interrogated the witness as follows:

Was anything said about perjury?

Witness: He said I could have gotten five years for perjury since I didn't let him know where I were, or that I was intending to leave town.

Counsel then asked the following questions:

237 Q. You mean to say Mr. Parrish told you that because you didn't appear as a witness, you could be sentenced for five years for perjury.

A. It was something like that, yes.

Q. That frightened you, didn't it?

A. It did.

237 Thomas W. Parrish was recalled as a witness by the government. He denied that he told Faye Jackson that if she did not come in and testify against the defendant that she could be put in jail for five years or for any period.

On cross examination, the following took place:

238 Q. Didn't you tell Mrs. Norwood if she didn't testify, she would be held in contempt of court?

A. Let me think sir, please.

Q. Didn't you tell her that?

A. No, sir, I did not. Could I explain what I did tell her.

• • • •

242 Q. Mr. Parrish, she told you at various times she didn't want to testify against Mr. Smith, isn't that right? • • •

A. She had told me that she didn't want to appear in court, yes, sir.

Q. Didn't you then tell her if she didn't appear in court and testify against Smith that she could be held for contempt of court?

A. I have already answered that, no. I told if, if I may answer, that if she did appear in court and did not tell the truth, she could possibly be held, not for contempt of court, but perjury. (R. 242)

• • •

On redirect the following took place.

Q. Mr. Parrish, would you tell us, please, exactly what you did tell her?

244 A. I told her that if she took the stand that she should tell the truth regarding her association with the defendant in this case, because if she did not tell the

truth, she could be subject to possible perjury charges and possible contempt of court.

Thereupon the government rested its case.

246 Motion for judgment of acquittal denied.

Evidence introduced on behalf of the defendant.

247 Grant Smith testified that he is 39 years of age, born in Montgomery, Alabama, and had schooling up to ninth grade. Thereafter he worked as a delivery boy, laborer, elevator operator, and now is engaged in managing a tavern. He met Mrs. Norword in December, 1956, at the Pershing Lounge. (R. 249) He met her again three weeks later. She told him she had lived in Detroit and that she was married and had children. (R. 250) She told him at that time she was attending a modeling school. He did not know that she was a prostitute. (R. 250) After he met her she left and came back around the 20th of January. At that time she told him she had gotten into some trouble in Detroit and had to go there every month for probation report. (R. 251) She said that she had missed reporting for the month of December and that she needed $150 to straighten out her probation so she would not have to go to Detroit every month. (R. 253) He loaned her $100 on January 21st. He saw her about 2 weeks later at the Pershing Lounge. He did not know that she went to Waynesville, Missouri. She said she was going to Detroit. (R. 255) While she was gone she called him and told him she was out of town but she was going to send him some money. (R. 255) He did not know where the money came from until after he was arrested. (R. 255)

255 He further testified that his boss called him and told him that an FBI agent was out at his place and that he would return at 3:00 o'clock. The defendant went there to meet him at which time he was arrested (R. 256).

Before he received the money he received a call from Frances Norwood. She told him she was not in Chicago but she was going to send him his money. He denied that he received $195.00 from her. (R. 257) He denied that he told her at any time to go to Waynesville, Missouri, for the purpose of engaging in prostitution. (R. 257)

While she was away some one from Detroit inquired about her. He learned from him in March that she was a prostitute. (R. 258) Three days later when he saw her at the Lounge, he talked to her about it. At first she denied she was a prostitute, but later she admitted it. They had been drinking and they left the Lounge and went to her house. (R. 259) He told her he didn't like prostitutes and she threw a glass of whiskey at him. He threw a bottle back at her and she became very angry and said she was going to get even with him. (R. 261) He said he did not see her again until he saw her in court.

After court adjourned he received a call from her. She told him that she was sorry for what she did. That they told her they would give her five years if she didn't testify to what she had said. (R. 262)

He was called by his boss who told him that an FBI agent wanted to see him. He went to the Lounge and the agent came in and he walked over to him and asked him if
263 he was looking for him. The agent told him he was under arrest. He asked the agent for what and he replied that he had sent some girl to Missouri. Smith told the agent that he didn't send anybody to Missouri. The agent referred to her as Faye Jackson or Louise Young. He didn't know her by that name since the only name he knew her by was Frances Norwood until this time. (R. 263)

The defendant denied that he ever persuaded, enticed, induced or coerced or assisted in inducing or persuading or enticing or coercing Mrs. Norwood to go to Missouri for the purpose of engaging in prostitution. (R. 264)

264 On cross examination, the defendant testified that he lives with his mother at 5100 S. Ellis. That he is manager of the Pershing Lounge at a salary basis. He did not know that Government's Exhibit 2, a Western Union Money Order, came from Missouri. He did not remember exactly whether he received the money order on the same day he received the telephone call or a day after. He did not notice that it stated that it was telegraphed from St. Louis, Missouri. He took it for granted that it came from Michigan because that was where he thought she went. When he received the telephone call, the operator did not talk to him. When he picked up the phone she was on the other end. He asked her when she got back and she said that she was not in town. When he picked up the phone he talked to Mrs. Norwood. He did not remember anyone saying "this is a long distance call" or "will you accept a call from St. Louis." He had an argument with Mrs.
266 Norwood and threw a bottle at her from which she suffered a cut. He did not know whether the cut required any stitches. He lives at 5100 Ellis, in the third apartment consisting of eight rooms. His mother and her husband, his nephew and a roomer by the name of Williams live there. There have been other roomers there at times. He had no other occupation than that of manager of the Pershing Lounge.

Motion for judgment of acquittal at the conclusion
271 of all the evidence in the case denied.

330 The charge of the Court

The Court's charge to the jury.

330 By The Court: Ladies and Gentlemen of the Jury:

It is the duty of the court to deliver to you instructions for your guidance in the consideration of the evidence and in your deliverations upon this case.

The instructions which the court will give you, insofar as they pertain to the principles of law applicable to this case, must be accepted by you as a binding control and guide in your consideration of the evidence and in your deliberations.

The responsibility rests upon you to determine the facts of this case, under the law as the court may give it to you, uninfluenced by any expression of opinion that the court has made or may hereafter make upon matters of fact. The court has not intended at any time during the trial of this case, and does not intend at any time, to express any opinion on any matter of fact, and if the court has expressed or does express any opinion on any matter of fact you are at liberty to disregard such opinion, in it is
331 your duty to disregard it, if it is different from your own opinion.

This is a criminal case, and the law in such cases is that a defendant comes into court presumed to be innocent, and that presumption protects him until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment.

The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty, you must believe from all the evidence, and beyond a reasonable doubt, that the facts proven are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt you should adopt the former.

The defendant on trial has pleaded not guilty. This puts the burden of proving the charges in the indictment upon the Government, and you cannot find the defendant guilty unless, from all the evidence, you believe him guilty of

the offense charged in this indictment beyond a reasonable doubt.

332 A reasonable doubt is what the term implies,—a doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means, simply, an honest doubt that appeals to reason and is founded upon reason. If, after considering all the evidence in the case, you have such a doubt in your mind as would cause you, or any other reasonably prudent person, to pause or hesitate before acting in a grave transaction in your own life, then you have such a doubt as the law contemplates as a reasonable doubt.

You are the sole judges of the credibility and weight which is to be given to the testimony of the witnesses who have testified upon this trial. In weighing the testimony of each witness you should carefully scrutinize the same; consider all the circumstances under which the witness testified; his demeanor on the stand; the relation which he bears to the Government or the defendant; the manner in which he might be affected by the verdict; the extent to which he is corroborated or contradicted by other credible evidence, and, in short, any circumstances that tend to throw light upon his credibility. And, applying these

333 tests which I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness.

Your verdict in this case must be reached from a consideration of all the evidence in the case, but if any evidence was admitted and was later stricken out you must wholly disregard such evidence as was stricken out.

During the trial of a law suit it often becomes the duty of counsel for the parties to object to questions, or to evidence, and I instruct you that you shall not take into

consideration against such party either such objections or the number of them, nor permit yourselves to be in any way influenced by such objections against the parties.

The fact that an indictment has been returned is not evidence; nor is the indictment evidence; and neither the indictment nor the return thereof should be considered by you as evidence in determining the guilt of the defendant. The indictment is not to be treated by you as raising any kind of presumption or creating any kind of prejudice
334 against the defendant. The indictment is simply the form or manner prescribed by law for preferring a charge against an individual, and must be regarded in that light, and in no other light.

The defendant has testified on the witness stand. You have heard his testimony. You should weigh the testimony of a defendant by the same rules that you would weigh the testimony of any other witness. But you should keep in mind that he is the defendant in the case and, of course, has a vital interest in the outcome of this trial.

One method of impeaching a witness is to show his previous conviction of a felony. You have heard evidence of the previous conviction of certain of the witnesses of felonies. You may, and it is your duty, to take that evidence into consideration in determining the credibility of such witnesses. However, the evidence of the conviction of such witnesses of felonies should not be considered by you in any other respect than as bearing upon the credibility of such witnesses' testimony.

The indictment in this case consists of two counts, each count charging the defendant Grant W. Smith with a separate and distinct crime.
335 Count One of the indictment charges that on or about January 31, 1957, in Chicago, Northern District of Illinois, the defendant Grant W. Smith, knowingly per-

suaded, induced, enticed and coerced a woman, to-wit, one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois, to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purpose, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce, to-wit, from Chicago, Illinois, to Waynesville, Missouri, in violation of Section 2422, Title 18 United States Code.

Count Two reads the same as Count One, except that in Count Two the date of the alleged crime is on or about February 28, 1957, whereas the date of the alleged crime in Count One is on or about January 31, 1957.

The statute of the United States upon which both counts of the indictment is based reads as follows:

> "Whoever knowingly persuades, induces, entices,
> 336 or coerces any woman ***** to go from one place to another in interstate ** commerce, ** for the purpose of prostitution or debauchery, or for any other immoral purpose *** and thereby knowingly causes such woman ** to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate ** commerce, ** shall be" punished.

The court instructs you that the term "interstate commerce" includes transportation from any state to any other state; and that the term "common carrier" as used in the statute just read to you may mean a railroad.

The court instructs the jury that the Government must prove beyond all reasonable doubt that the defendant induced, enticed and coerced one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois to Waynesville, Missouri, for the purpose of prostitution.

The court instructs the jury that if they find from the evidence that the said Mae Frances Young, also known as

Faye Jackson, went from Chicago, Illinois to Waynes-
337 ville, Missouri and engaged in prostitution in Waynesville, Missouri, and upon return to Chicago, Illinois gave part of the money she earned as a prostitute to the defendant, such evidence is not sufficient to find the defendant guilty if he did not persuade, induce, entice and coerce the said Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois to Waynesville, Missouri.

The court instructs the jury that if they find from the evidence that the said Mae Frances Young, also known as Faye Jackson, went from Chicago, Illinois to Waynesville, Missouri without being persuaded, induced, enticed and coerced to do so, then the defendant must be acquitted.

Before you may find the defendant guilty on either count of this indictment you must believe from all the evidence and beyond a reasonable doubt that the defendant, on or about the date alleged in the court, knowingly persuaded, induced, enticed or persuaded the woman named in the indictment to go from Chicago, Illinois, to Waynesville, Missouri, in interstate commerce, that is from one State to another state, for the purpose of prostitution or debauchery, or for any other immoral purpose, and that he thereby knowingly caused such woman to go and to be carried or transported as a passenger upon the line
338 or route of a common carrier in interstate commerce.

You have only one duty to perform, and that duty is to tell the court whether or not this defendant is or is not guilty as charged in the indictment. Under no circumstances need you consider the matter of punishment. That is a matter committed to the attention of the court alone.

338A When you go to your jury room, ladies and gentlemen, you will take with you these instructions which I have just read to you and the exhibits which have been

offered and received in evidence and which properly go to the jury and which counsel will now assemble and hand to the Marshals, and also three forms of verdict, the first of which reads as follows:

> "We the jury find the defendant Grant W. Smith not guilty as charged in the indictment."

If you find the defendant not guilty on both counts, you will use this form which I have just read to you, twelve of you will sign the form and return it to the Court.

The second form of verdict which you will take with you reads as follows:

> "We the jury find the defendant Grant W. Smith guilty as charged in Count No. ... of the indictment, and not guilty as charged in Count No. ... of the indictment."

If you find the defendant guilty on one of the counts of the indictment and not guilty on the other, you will fill in these two blanks in this form which I have just read 339 to you and thereby indicate the count upon which you find the defendant guilty, and also the count upon which you find the defendant not guilty, and after the form correctly expresses your conclusions, the twelve of you will sign that form and return it with you into court.

The third form which you will take with you reads as follows:

> "We the jury find the defendant Grant W. Smith guilty as charged in the indictment."

If you find the defendant guilty on both counts of the indictment, the twelve of you will sign this third form which I have just read to you and return it with you into court.

I suggest, ladies and gentlemen, that when you first go to your jury room, you select some one of your number to serve as foreman or forewoman and to preside over your deliberations.

Thereafter the Jury returned the following verdict:

"We, the jury, find the defendant guilty as charged in the indictment."

Motion for a new trial made and continued to June 27, 1957.

On the motion for new trial, the following proceedings took place:

354 Mr. Bellows: Your Honor, since the return of the verdict in this case certain matters arose of which I have informed the United States Attorney. Within a day or two after the defendant was found guilty, I received a telephone call from my client that the victim in this case, Fay Jackson, or Mrs. Norwood, wanted to come in and talk to me. I said she could come in and see me.

I had a court stenographer present when she came in. She told me that she wanted to change her story. I asked her whether or not the testimony she gave to your Honor was false. She said part of it was not true.

I asked her what part of the testimony was not true, and she said that part in which she gave the inference that he sent her to Missouri. I told her that if she told the court that or she made an affidavit to that effect that your Honor might consider that to be perjury or contempt
355 of court. She said in that case she would like to consult with an attorney.

I said, "Very well," she could do as she liked. Sometime after that, your Honor, she consulted—talked to two lawyers and she made an affidavit to them. I have made that part of the motion for a new trial, the supplementary motion for a new trial, which I have attached as one of the grounds for a new trial.

Last Monday I spoke to Mr. McGarr. I told him of the situation. I thought it was only fair that the United States Attorney be acquainted with the change of heart of a witness, which always gives a court misgivings as to the man-

ner in which it was taken and the motive that might have caused the change in testimony.

I also talked to Mr. Connelly and told him of the witness' change of heart and asked him to communicate with her and find out if she were telling the truth or wasn't telling the truth at this time.

I have given all the information to the United States Attorney, including the transcript of testimony or
356 statement that she made to me in my office, your Honor. She is here in court today.

Of course, if she lied before your Honor, why, then, of course, I think your Honor would give a great deal of consideration in determining whether or not the defendant should be granted a new trial. She is here today.

The affidavit of Faye Jackson was presented which is as follows:

State of Illinois,
County of Cook—ss.

STATEMENT OF FAYE JACKSON
alias MAE FRANCIS NORWOOD

June 15, 1957

My name is Faye Jackson. I live presently at 643 W. 61st Street, Chicago, Illinois.

On Sunday, about March 17, 1956, Grant Smith and I had a fight in Washington Park sometime after midnight. I was angry with him because he had hurt me. I went to Cook County Hospital and the FBI came over that Monday. They told me I had went out of town for prostitutes and that I had sent money sent back by M. O.

I told them I had been a prostitute for Grant Smith and he had sent me out of town to Missouri. I was angry with Grant and I wanted to get even with him. I was in pain and my feelings were hurt. All the money I ever got from

most was money I had borrowed. I still owe him about $400 or $500. I had owed him over a thousand dollars.

On April 15th the FBI arrested me and took me to Rockford and put me in jail under a $5000 bond. I don't know what I was charged with. I was not permitted to see a lawyer or write or call or anything. I had had a change of heart after making the statement to the FBI which is why I skipped out on the police detail here in Chicago about April 1st right after I was released from the hospital on March 29th.

The F.B.I. told me how much time I would get if I didn't cooperate with them. They told me Grant was a vicious person and that they had heard he was going to kill me and that if I didn't go along with them something terrible would happen to me.

I appeared in Court as a witness against Grant Smith on June 10th in the U. S. Dist. Court here in Chicago the same day I was released from jail in Rockford. I came straight from jail in Rockford in custody of U. S. Marshall to the Court here.

I made statements against Grant that were not true in that I told the Court that Grant had sent me to Rockford for prostitution and that he had given me money to go to Detroit to see my children, but actually I didn't go to Detroit instead I went to Waynesville, Mo. Grant did give me money on 2 occasions to go see my children at the end of Jan. and Feb. of this year.

Ever since I so testified I have been bothered by my conscience to the point where I can't eat or sleep at night. No one has talked to me to try to get me to change my story. It's just me. I just know that I can't go on living and knowing that I have wronged that man in trying to send him to the penitentiary. I know what it all means lying on the witness stand but still it's me. I'll feel better knowing that I had told the truth anyway. I just had to come to talk to somebody.

I saw Atty. Matt Moran's picture in Jett with Grant and I knew he was connected with this case. When I got to trial in Court I didn't see Atty. Moran, and I didn't know any lawyer here so I contacted Atty. Moran and he referred me to you (meaning Atty. Theodore Howard).

I just made this statement in the presence of Atty. Matt Moran on June 15th, 1957, in the presence of Lawrence Owens and James I. McGill. I make it again without any alteration. I am under no threat or fear whatever but my conscience.

Faye Jackson

State of Illinois,
County of Cook—ss.

Faye Jackson, also known as Mae Francis Norwood, having been first duly sworn deposes and states that she has read and heard read the foregoing statement by her above subscribed and that the same is true in substance and in fact.

Faye Jackson

Subscribed and sworn to before me
this 15th day of June, 1957, A. D.
Helen Wallace
Notary Public

• • •

374 Mr. Bellows: * * * I warned her and I told her that your Honor might punish her or that she could be punished if she lied by making a false affidavit or testifying in this case. She has consulted with attorneys. She still wants to make the same story, and she is here, and I would like to, with the permission of the Court, to call her and ask her—

By The Court: You put her affidavit in. I assume you regard that as sufficient when you filed it.

By Mr. Bellows: Yes, your Honor.

By The Court: I assume she would say the same thing if she were on the stand.

375 Thomas W. Parrish was called as a witness by the
376 government and testified that he talked to Faye Jackson. He stated that Faye Jackson did not make a statement that Grant Smith never sent her to Waynesville, Missouri. He did not tell Faye Jackson what she should say at the trial. He only told her she should tell the truth. He did not make the following statement to her, "But it is not fair. If somebody tried to knock your eye out, wouldn't you do whatever you could to see he was punished for it." He did not exhibit a telegram to Faye Jackson
377 while she was in the County Hospital. Faye Jackson was contacted three times at the County Hospital by the FBI.

Q. On page 6 of the statement given by the witness after trial to Mr. Bellows the question was asked:

"Why did you give a different impression when you testified or intend to give a different impression when you testified in court against him?

"A. They had me all frightened. They told me I am on probation in Detroit. They said they were going to
378 see I got some time out of it. I told them up at County, after they arrested me and took me to Rockford, the Rockford County Jail, I said I would not testify against Mr. Smith. I said what I was doing, I was doing it before I even knew him. He did not entice me into anything. What I did was because I wanted to do it. The money, I gave it to him, I gave it to him because I wanted to, not because he put any pressure on me, which he did not.

"He never asked me for any money. I just gave it to him to take care of me. I was frightened. That was the reason why. I thought I probably would get some time out of it. I had two people to see me. They said I would get time from it, probation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12099

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GRANT W. SMITH, Defendant-Appellant	Appeal from the United States District Court for the Northern District of Illinois. Honorable John P. Barnes, Judge Presiding.

APPELLEE'S BRIEF AND APPENDIX

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Assistant United States Attorney
Of Counsel

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In The
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APPELLEE'S BRIEF.

STATEMENT OF FACTS.

Inasmuch as the defendant has set forth a summary of the evidence, the Government will prsent no formal statement of facts, but will refer in its argument to *its* appendix and to the record, when necessary.

The defendant has understandably diluted some of the evidence in his statement. We reserve the right to invite the Court's attention to such portions of the appendix as will tend to sustain the Government's proof in this case.

We further reserve the right to dispute the conclusions and inferences drawn from the defendant's statement of facts in his argument, and will take specific issue with such conclusions and inferences in our ensuing argument, with appropriate reference to his points of the brief with which we cannot agree.

SUMMARY OF ARGUMENT.

I.

Not only has the defendant failed to sustain his burden of proof in his attack on the selection of jurors in the Northern District of Illinois but on the contrary, the evidence adduced indicates that jurors are selected in a fair and impartial manner from a wide and representative cross section of the people in the community. Special pains are taken by the Clerk to maintain the balance racially and geographically, and every economic, social, religious, racial, political and geographical group is represented.

II.

There is substantial evidence of the guilt of the defendant to support the jury verdict of guilty, and the Court which heard the evidence and observed the witnesses was convinced beyond a reasonable doubt that the finding of the jury was correct.

III.

Even though certain matters referred to by the prosecutor in his opening statement were not subsequently proved there was no bad faith present nor were the matters not proven clearly prejudicial. The matters not proved were called to the attention of the jury indirectly by the prosecutor and directly by counsel for defendant who admitted that the prosecutor had been fair.

IV.

The attempted recantation, obtained under suspicious circumstances, even if true, would not have affected the verdict of the jury and the statement given by the witness to counsel for defendant reiterated all the necessary elements to sustain the conviction.

CONTESTED ISSUES.

1. Whether the selection of 50 per cent of the array in the Northern District of Illinois by selecting names at random from telephone directories, and 50 per cent from lists furnished by Catholic, Protestant, Jewish and Negro churches, Labor Unions, Veterans Organizations, Parent Teacher Associations, Women's Clubs, Rotary's, Lions, Elks, Odd Fellows, Postmasters, Urban League, Y.M.C.A., St. Kilian Society, Catholic Parochial School, and names recommended by previous jurors and persons known to the Clerk, and volunteers, amounts to such systematic and intentional exclusion of certain economic, social, religious, racial, political or geographical groups as to deprive the defendant of a trial by jury as guaranteed to him by the Sixth Amendment to the constitution of the United States.

2. Whether the evidence against the defendant considered in the light most favorable to the Government supports the guilty verdict of the jury.

3. Whether the opening statement made by the United States Attorney containing matters which he stated he would prove, and did not, was so clearly prejudicial as to require a reversal of the jury finding of guilty.

4. Whether the Court erred in refusing to grant the defendant a new trial on the basis of a post trial affidavit made by the victim.

PROPOSITIONS OF LAW RELIED UPON.

I.

The Defendant Was Not Deprived Of A Jury Selected From A Truly Representative Group Of The Community As Guaranteed To Him By The Sixth Amendment To The Constitution Of The United States.

Glasser v. United States, 315 U. S. 60;
United States v. Brandt, 1955, 139 F. Supp. 349;
Thiel v. Southern Pacific Co., 328 U. S. 217;
Dow v. *Carnegie Illinois Steel Corp.*, 3 Cir., 1955, 224 F. 2d 414, cert. den. 350 U. S. 971;
People v. *Peterson*, 153 Ill. App. 480;
People v. *Madison County*, 125 Ill. 334;
Matsuo v. *Dulles*, 133 F. Supp. 711;
Barber v. *Yanish*, 9 Cir., 1952, 196 F. 2d 53, cert. den. 344 U. S. 817;
Title 28, U. S. C., Sec. 1861 as amended Sept. 9, 1957.

II.

Viewing The Evidence Against The Defendant In The Light Most Favorable To The Government, The Record Contains Substantial Proof To Support The Jury Verdict Of Guilty.

United States v. Marachovsky, 7 Cir., (1953), 201 F. 2d 5, cert. den., 345 U. S. 965;
United States v. Detente, 7 Cir., (1952), 199 F. 2d 286, 288;
United States v. Poppa, 7 Cir. (1951), 190 F. 2d 112, 114;
United States v. *Kadison*, 7 Cir. (1944), 145 F. 2d 525, 526;
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United States v. *Feinberg*, 7 Cir. (1941), 123 F. 2d 425;

McGuire v. *United States*, 8 Cir. (1945), 152 F. 2d 577, 580;

United States v. *Barton*, 2 Cir. (1943), 134 F. 2d 484, 485;

United States v. *Reed*, 2 Cir. (1938), 96 F. 2d 785, cert. den. 305 U. S. 612.

III.

A Conviction Will Not Be Reversed In The Absence Of Bad Faith Or Clear Prejudice Because The Prosecutor Refers In His Opening Statement To Matters Not Subsequently Proved.

Nichamin v. *United States*, 6 Cir. (1920), 263 F. 880, 882;

United States v. *Lanza*, 2 Cir. (1936), 85 F. 2d 544, cert. den. 299 U. S. 609;

United States v. *Scoblick*, 124 F. Supp. 881, 885; affirmed 217 F. 2d 727;

28 ALR 2d 972, 974.

IV.

The Court Did Not Err When It Refused To Grant Defendant A New Trial On The Basis Of A Post Trial Affidavit Given By A Government Witness.

Larrison v. United States, 7 Cir. (1928), 24 F. 2d 32;

Martin v. United States, 5 Cir. (1927), 17 F. 2d 973;

United States v. Pruitt, (1954) 121 F. Supp. 15, affirmed 217 F. 2d 648, cert. den. 349 U. S. 907;

Adams v. *United States*, 9 Cir. (1951), 191 F. 2d 206;

Apodaca v. *United States*, 10 Cir. (1951), 188 F. 2d 932.

ARGUMENT.

I.

The Defendant Was Not Deprived Of A Jury Selected From A Truly Representative Group Of The Community As Guaranteed To Him By The Sixth Amendment To The Constitution Of The United States.

The affidavit in support of a motion challenging the array was not admitted by the Government and the testimony disclosed that it contained half truths and conclusions not supported by the record.

Apparently the defendant has no objection to the selection of one-half the jurors by Commissioner Crooks who used the telephone directory. All of the names so selected, if not ineligible, are used to make up one-half the array.

An unbiased analysis of Clerk Johnson's testimony reveals a fair and impartial selection of the jurors to serve in the federal courts and an abstract of his testimony appears at pages 1a and 2a of the Appendix hereto and should be read in connection with this point.

Counsel complains that the Clerk of the Court failed to keep adequate records. Mr. Johnson was forced to testify without his records because counsel served upon him at about 10:15 A.M., June 10, 1957, a subpoena *duces tecum* requiring his presence in the court at 10:00 A. M., June 10.

A careful reading of the transcript reveals that the Clerk was unable to answer many of counsel's questions because he was not given sufficient time to gather his records and not because there were no records.

In the case of *Glasser* v. *United States*, 315 U. S. 60, a challenge to the array was overruled because of lack of proof in the record. The language favorable to appellant cited in his brief arose out of the peculiar circumstances of that case and the facts are easily distinguished. In the *Glasser* case all of the women on the jury were taken from a list furnished by *one* organization, The Illinois League of Women Voters, and they had attended jury classes whose lecturers presented the views of the prosecution. As now selected, 50 per cent of the jurors come from listings in the telephone directory and the other 50 per cent from many lists of many and various organizations the membership of which includes every economic, social, religious, racial, political and geographical group in the community.

In the case of *United States* v. *Brandt*, D.C. N.D. Ohio, E.D. (1955), 139 F. Supp. 349, the defendants attacked the selection of the jury on many grounds, among them that one juror had been recommended by the then District Attorney and also the sponsor system whereby the Clerk wrote to individuals and organizations for the names of prospective jurors.

As to the juror recommended by the District Attorney the Court said, at page 360:

> "The contention that one of the members of the indicting grand jury was disqualified because she was recommended for jury service by the then District Attorney, is without substance. The juror in question was fully competent to serve, and her recommendation by a Government official did not disqualify her. * * *"

In connection with the sponsor system the Court said, at page 360:

"Defendants' attack on the sponsor system as being invalid is unsupported by reason or authority. Jury officials have a wide discretion as to the manner and means of selecting names for jury service. *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 221. And it has been held specifically that the sponsor system is lawful. *Walker* v. *United States*, 8 Cir., 93 F. 2d 383."

In *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, persons who worked for a daily wage were intentionally and systematically excluded. There is certainly no evidence of a systematic and intentional exclusion of any group in this record.

In the case of *Dow* v. *Carnegie Illinois Steel Corporation*, 3 Cir. (1955), 224 F. 2d 414, cert. den. 76 S. Ct. 442, 350 U. S. 971, the Court discusses in great detail the selection of the jury and considers substantially all of the points raised by defendant herein. It was held that the method of selection there which is substantially the same as practiced in this District was proper.

It should be pointed out that there is absolutely no evidence in the record that any members of this particular array or this particular jury were volunteers. No objection was raised on this specific ground nor did the defendant exhaust his peremptory challenges. There is also no evidence that this defendant was in any way prejudiced because the jury may have had members that had volunteered.

The fact that a volunteer is not eligible for jury service under Illinois law creates a challenge for cause but in and of itself would not void the verdict of a jury.

The federal government has never considered itself unalterably bound by the qualifications set up by the State. In the *Thiel* case, *supra*, the Court said at page 221:

"A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors."

It should also be pointed out that whether or not a person "volunteered" has nothing whatever to do with a person's qualifications to serve as a juror, but is an arbitrary matter.

In *People* v. *Peterson*, 153 Ill. App. 480, the Court held that an irregularity in the selection of jurors does not require the reversal of a judgment founded on their verdict unless it appears that defendant has been in some way prejudiced.

And in *People* v. *Madison County*, 125 Ill. 334, the Court held that even if it be assumed that the jury was obtained irregularly, a challenge to the array will not be sustained, where it is not also shown that a positive injury has been sustained in consequence of the refusal of the Court to quash the panel.

In any event the question of volunteers being or not being qualified jurors is now moot since the Congress of the United States expressed its opinion on this point this year when it repealed Section 1861 of Title 28, U. S. C., which section sets up the qualifications for federal jurors. The new Section 1861 eliminates paragraph 4 of the old Section which required that prospective jurors meet the qualifications for jury service set by the State in which the district court was sitting. This bill was signed by the President on September 9, 1957.

Since the manner of selection and the qualifications of jurors are procedural matters they are now governed by the new statute which eliminates the state qualifications. There is no vested right in procedure which makes it

immune to change by Congress. *Matsuo* v. *Dulles*, 133 F. Supp. 711; and *Barber* v. *Yanish*, 9 Cir., 1952, 196 F.2d 53, and cases cited in footnote.

Approximately 2,000 jurors are used each year and counsel complains that Clerk Johnson excludes from jury service the great majority of the population of the community. That must necessarily be true when the population is approximately 5,000,000. If we were to use every person in the community it would take 2,500 years before each person could serve, and the possibility exists that by that time many of the people would be dead.

The real test is whether the jurors selected represent a cross-section of the community from an economic, social, religious, racial, political and geographical standpoint, and this test is met.

II.

Viewing The Evidence Against The Defendant In The Light Most Favorable To The Government, The Record Contains Substantial Proof To Support The Jury Verdict Of Guilty.

This Court has held repeatedly that on appeal from a jury verdict of guilty, the evidence must be taken in the light most favorable to the Government, and it will neither weigh the evidence, nor consider questions of credibility, nor resolve conflicts in testimony. *United States* v. *Marachovsky*, 7 Cir., (1953) 201 F. 2d 5, cert. den., 345 U.S. 965; *United States* v. *Detente*, 7 Cir., (1952) 199 F. 2d 286, 288; *United States* v. *Poppa*, 7 Cir., (1951) 190 F. 2d 112, 114; *United States* v. *Kadison*, 7 Cir., (1944) 145 F. 2d 525, 526; *United States* v. *Chiarelli*, 7 Cir., (1951) 192 F. 2d 528, 531, and *United States* v. *Feinberg*, 7 Cir., (1941) 123 F. 2d 425.

The victim testified that she had a conversation with the defendant a week or two after they first met. "He (the defendant) talked of our relationship with each other. We—I decided to be his girl friend." (App. 3a) "He asked me who was my boy friend, and I told him I didn't have one. So that is how we got together." She said she was associated with the defendant as his "girl friend" for four or five months.

It is a matter of common knowledge and the jurors were no doubt aware of the fact that in the prostitute-panderer relationship the men and women involved do not refer to themselves as prostitute and pimp but as "girl friend" and "boy friend" or "man", and that the girl makes no move without the approval of her "man." This manifested itself prior to the first trip to Waynesville when the victim called the defendant on the phone and told him she would like to go to Waynesville, Mo., with Joanne.

He said it was *O.K.* with him if she wanted to go. Why should she even call the defendant for his O.K. unless he was her "man"?

She had no money and he told her to drop by his apartment. She did and he gave her $15.00 for train fare.

The victim testified she bought a train ticket with the money defendant gave her and went to Waynesville, Mo., near Ft. Leonard Wood and performed acts of prostitution from which she earned $219.00. When the victim returned after one night's work in Missouri she gave the defendant $195.00 of the $219.00 earned. The balance was no doubt spent for expenses on the trip and return fare.

In connection with the second trip to Waynesville the victim testified that "Well, he (the defendant) was talk-

ing about going back to Waynesville." (App. 3a and 4a) "Well, he just told me, at least we both were talking about it, going back down to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he said it would be all right for me to go by myself, and he give me money to go."

It will be noted that although the victim did not want to go by herself, she *did* go by herself when the defendant "suggested" she should go.

Members of the jury were also probably aware that the last of the month would be a "nice time" for any prostitute to visit an army town since the soldiers get paid at that time.

The victim took the $20.00 defendant gave her and bought a railroad ticket for St. Louis. She again went to the Cactus Club in Waynesville, Mo., and performed acts of prostitution from which she earned $175.00. She sent $100.00 of this to Smith by Western Union money order.

The defendant knew Jackson was going to Waynesville for prostitution on both occasions, paid for her transportation and confiscated her earnings.

In *McGuire* v. *United States*, 8 Cir., (1945) 152 F. 2d 577, at page 580, the Court said:

> "It was for the jury to decide whether appellant's actions aided or assisted in inducing the particular violations of the Act charged in the counts on which appellant was convicted."

The actions of this defendant not only aided and assisted in inducing the violation but without his "O.K." to

make the trip and the train fare he furnished there would have been no violation.

In the case of *United States* v. *Barton*, 2 Cir., (1943) 134 F. 2d 484, a White Slave Case involving inducement, Judges L. Hand, Augustus N. Hand and Frank, said, at page 485:

> "It is true that the girl herself vigorously denied that the accused had induced her to go, but the jury need not have accepted that, because from her testimony it appeared that it was her habit, when the accused called upon her, to entertain the customer selected for her, and to divide her earnings equally with the accused. The jury would have been justified in understanding from this that in such cases she would follow the directions of the accused, certainly to the extent of not going where the accused did not wish her to go. • • •"

It should be noted here that even when the victim attempted to recant her testimony by affidavit and by a statement made in the office of counsel for defendant after the trial, she reaffirms the prostitute-panderer relationship (page 6 of Statement given to Mr. Bellows on June 13, 1957) (App. 15a) "The money, I gave it to him. I gave it to him because I wanted to, not because he put any pressure on me, which he did not. He never asked me for any money. *I just gave it to him to take care of me.*" (Emphasis supplied)

To whom does a prostitute contribute her earnings so she may be taken care of?

In the case of *United States* v. *Reed*, 2 Cir., (1938) 96 F. 2d 785, the jury finding that the victim was induced to go from New York to Florida, by the defendant, was upheld even though the witness testified that she always wanted to go to Florida and paid her own way.

This is not a strange white slave case at all. It follows the usual pattern. There is no case until the victim has some reason to tell the truth about the illicit relationship. Here the defendant knocked the victim's eye out. She temporarily overcomes the emotion she designates as love and tells the truth to agents that visit her in the hospital. She repeats her story under oath to an Assistant United States Attorney and to the Grand Jury. When she recovers and the emotion of "love" for her "man" returns, she realizes he may go to jail. She comes under his spell and eludes police protection. When apprehended upon a material witness warrant and removed from the domination of the defendant she repeats her true story in court. Immediately after the trial, she is again dominated by her "man" and appears in his lawyer's office with him to try to save him from jail.

The only reason this defendant wanted her to stop prostitution was to become a shoplifter for him. It was more profitable (App. 5a).

F.B.I. Agent Parrish did not tell the witness that she had to testify against the defendant. He told her that if she did take the stand she should tell the truth and advised her that if she did not tell the truth she might be subject to possible perjury charges or possible contempt of Court.

Counsel now complains that the witness should not have been advised about perjury, but if this were a perjury trial he would complain that she was not advised of the possibility of such charge before testifying.

The testimony of the defendant would naturally exonerate him and did, but it is apparent from the verdict that the jury did not believe him.

The matter of the recantation will be dealt with in Point IV of this brief.

III.

A Conviction Will Not Be Reversed In The Absence Of Bad Faith Or Clear Prejudice Because The Prosecutor Refers In His Opening Statement To Matters Not Subsequently Proved.

When the victim was relating a conversation with the defendant and said she decided to be his girl friend, the question was asked as to what she meant. Defense counsel objected, but had the witness been permitted to explain the relationship and what she meant by becoming his girl friend she would have testified that she was to turn over her earnings for her keep. This relationship was manifest in the statement the victim gave to defendant's counsel after trial where she stated she gave the defendant money *"to take care of me."* (App. 15a) The prosecutor failed to make an offer of proof at this point.

There is certainly evidence in the record that the victim turned over her prostitution earnings to the defendant, $195.00 of $219.00 earned on the first trip and at least $100.00 of $175.00 earned on the second trip.

The victim testified that they were discussing going back to Waynesville because "he said there wasn't any money in Chicago" (App. 4a).

There was no evidence about a phone conversation with another girl because that girl (Bertha-"Pony Tail") was conveniently unavailable for service of subpoena. At the time of the opening statement the prosecutor still thought this witness would be found.

There was evidence in the record that the victim, in fact, stayed more than one day on the second trip and

was unable to work the second day because of police surveillance.

The prosecutor cautioned the jury in his closing argument that anything that he said which did not reflect their own recollection of what they remembered as coming from the witness stand was to be disregarded. (App. 12a).

The discrepancies between the prosecutor's opening statement and the proof as it ultimately developed was most competently pointed out to the jury by defendant's counsel in his closing argument (R 303-5).

The prosecutor was certainly not acting in bad faith when he presented his opening statement nor is there any clear prejudice shown. In fact, counsel for the defendant said in his closing argument (R 303) that the prosecutor "is a very fine gentleman, as he is fair. . . ."

The general rule is stated in 28 A.L.R. 2d 972, at page 974:

> "As a general rule, courts recognize the fact that proof frequently fails to come up to expectations, and so the tendency is to permit a prosecuting attorney a reasonable latitude in stating to the jury the facts proposed to be shown. And where no substantial prejudice results, and there is nothing to show that the prosecuting attorney acted in bad faith, the appellate court will usually refuse to reverse or to remand for a new trial because of a reference by the prosecuting attorney to matters which he subsequently made no attempt to prove."

In *Nichamin* v. *United States*, 6 Cir. (1920) 263 F. 880, the prosecutor failed to prove certain matters referred to in his opening statement. The Court said, at page 882:

> "The district attorney in his opening statement said that he would be able to show by the evidence

that these ingots were bought directly from the boys, that the age of the boys would indicate they could not honestly have possession of this character of property, and that the same was sold at a price that would indicate it was stolen. The evidence shows that the boys did not sell directly to the defendant but to a junk peddler, Schlaf, who in turn sold it to the defendant. While it is true that the evidence did not sustain these statements, the district attorney in making this statement was probably in good faith; at least, nothing appears to the contrary. He stated the facts as he expected to prove them. He failed to do this in some particulars. It is true that, if he had shown that this property was purchased directly from the boys and at a trifling price, it would have tended to prove guilty knowledge on the part of the defendant; but the failure of the district attorney to sustain his opening statements by the evidence could not be prejudicial to defendant but rather to the government. * * *"

In *U. S.* v. *Lanza*, 2 Cir., (1936) 85 F. 2d 544, certiorari denied 299 U. S. 609, the defendants claimed the prosecutor's opening statement was prejudicial because certain matters related were not proved. The Court said, at page 548:

"The prosecutor told the jury in an opening statement what the government expected to prove. It is now claimed that he overstepped the bounds of propriety in his zeal for conviction. No exception was taken to the statement when made, and there seems to have been adequate reason at the time for believing that it would be substantially borne out by the proof, as in fact it was for the most part. We think it fairly appears that the opening statement was made in good faith to inform the jury and the defense in a general way of the nature of the government's case, and that it did not go beyond this legitimate end."

In fact, the argument has been made that statements of the prosecutor not subsequently proved give the jury an unfavorable impression of the Government's case. For example see *United States* v. *Scoblick,* 124 F. Supp. 881, at page 885.

There is nothing in this record indicating bad faith on the part of the prosecutor nor does it show that his opening statement was clearly prejudicial.

IV.

The Court Did Not Err When It Refused To Grant Defendant A New Trial On The Basis Of A Post Trial Affidavit Given By A Government Witness.

In the case of *Larrison* v. *U. S.*, 7 Cir., (1928) 24 F. 2d 82, one of the principal witnesses for the Government recanted his testimony by subsequent affidavit. In discussing this the Court said, at page 87:

> "We shall approach this question on the assumption that a new trial should be granted when,
>
> "(a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury *might* have reached a different conclusion.
>
> "(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

(a) Was the Court *reasonably* well satisfied that the testimony at the trial was false? Judge Barnes said: (App. 16a and 17a).

> "* * * This witness—what is her name?"

"By Mr. Connelly: Fay Jackson."

"By the Court: (Continuing)—Fay Jackson is unquestionably under the control of this defendant. The emotion she feels toward him she doubtless calls and characterizes as love, and she doubtless calls him her sweetheart. There isn't any question about it, she was and is a prostitute.

"I am satisfied that this defendant was living off her earnings, taking her earnings from her, and was not treating her very well at that.

"Undoubtedly she will say when she gets under his influence just exactly what he wants her to say. I have not got the slightest doubt about that.

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the earnings of this woman, and I am sure that he induced her to change her story.

"I have never yet sentenced a man, fined him or sent him to jail or sent him to the penitentiary unless I was satisfied beyond all reasonable doubt that he was guilty, and that is what I feel about this man. If I did not feel that way I would not fine him, I would not sentence him, I would not put him on probation, I would not convict him. I am not going to change my mind about that either.

"I am satisfied beyond all reasonable doubt this defendant is guilty of the crime of which the jury found him guilty."

(b) Would the jury have reached a different conclusion? The only thing in the affidavit relating to the witness's testimony is contained in paragraph 7 thereof, as follows: (R 359, 360)

"'I made statements against Grant that were not true in that I told the court that Grant had sent me

> to Rockford for prostitution and that he had given me money to go to Detroit to see my children, but actually I didn't go to Detroit, instead I went to Waynesville, Missouri. Grant did give me money on two occasions to go see my children at the end of January and February of this year.' "

Even if we concede that she meant to say Waynesville instead of Rockford and that the defendant did not "send" her, what do we have? A conclusion by the affiant that she was not "sent". And what does she mean by being "sent"? On page 8 of the statement taken by Mr. Bellows from the witness in his office, this appears: (App. 14a)

> " 'Q. Well, did he send you there?"
>
> " 'A. Well, I got money from him to go there, but he did not send me there, he did not take me to the station and buy a train ticket and put me on the train. Wouldn't you say that was sending me if he took me to the train and bought me a ticket? He did not do that, so I would not say he sent me.' "

The statement is set out in full in the margin.[1]

---

[1] Statement of Faye Jackson, taken in Suite 123, 10 South LaSalle Street, Chicago, Illinois, at approximately two o'clock, June 13, 1957, upon interrogatories propounded by Charles A. Bellows.

Statement reported by James F. Finn for Lenore Weiss.

* * *

Mr. Bellows: Come in, Faye Jackson. You came in here with Mr. Smith?

Miss Jackson: Yes.

Mr. Bellows: Is there anything particularly you want to see me about?

Miss Jackson: Well, I want to see if we can do something about helping him.

Mr. Bellows: Q. Who?

A. Mr. Smith.

Q. How do you intend to help him?

A. Well, I wanted to see if we could get all this here off, you know, at this time, find him guilty in a case of—the testimony I gave in court the other day, I want to change it.

[1] (Continued)

Q. You mean you have come in to tell me you want to change your testimony?

A. Yes.

Q. Did you testify falsely when you testified against Mr. Smith? Did you testify truthfully against Mr. Smith?

A. Part of it falsely, part of it truthfully.

Q. Which part was false and which part was true?

A. Well, he did not send me down to Missouri. I asked him, I said I wanted to go. I said, "I do not have any money." I wanted to get some money from him. I said he sent me, but he did not send me. It was me going. I went.

Q. What about the rest of your testimony? Was that true or false?

Miss Jackson: About what?

Q. About giving him $195 after you returned—

Miss Jackson: I did.

Q. —From Waynesville, Missouri? That is, the first time.

A. I did.

Q. I want you to do the talking.

A. I did.

Q. And you sent him $100, also?

A. It was for a reason. I sent it to him so he could send it to my kids. ~~Smith said it was to repay loan.~~

Q. Now, you have made a statements to the contrary, have you not, to the Federal Bureau of Investigation?

A. True. A lot of it they were telling me to say mostly.

Q. What did anyone tell you to say?

A. He told me, he said, when they came to see me in the hospital, I did not send for any Federal policemen. They came to see me in the County Hospital and told me they had money orders which I had sent him. They told me, they said, they had their eye on Mr. Smith for a long time, and that there was nothing I could do. If I got up on the stand and lied, he said, to help him, he said, that I would get some time, and I asked him for what reason is there for me to lie. He said, "But it is not fair. If somebody tried to knock your eye out, wouldn't you do whatever you could to see he was punished for it?" I said, "I do not want to punish him." I said, "I do not want the police." I said, "Anything I have against him, I will give him myself if it takes the rest of my life." They kept coming back and pestering me in the hospital.

Q. When, if at any time, did you make the statement that Mr. Smith sent you to Waynesville, Missouri?

A. When he showed me the telegram.

(Continued)

Q. What did you say?

A. He asked me, "Isn't this you? Your name is on there, Faye Jackson?" I knew I could not lie because it had my handwriting there showing I did send the money so I said, "Yes," but I did not tell them I sent it to him, but I sent it to my kids. I was angry at Mr. Smith at the time. I told them a lot of things but so they would let me alone.

Q. The first time you talked to anybody from the Federal Bureau of Investigation was at the County Hospital?

A. It was.

Q. How many times were you visited by men from the Federal Bureau of Investigation at the County Hospital.

A. Oh, about 6 or 7 times.

Q. Well, in which conversation during those five or six times did you tell any man from the Federal Bureau of Investigation that Mr. Smith sent you to Waynesville, Missouri?

A. After he showed me the telegram.

Q. Did the men from the Federal Bureau of Investigation show you the telegram the first time?

A. No; they talked to me the first time.

Q. Which visit was it that they showed you the telegram?

A. Before we went to the grand jury hearing.

Q. Were you still in the County Hospital?

A. I was.

Q. How many times had they seen you previously?

A. About two or three times. There was a lot of them come to see me. Sometimes I would know who they were. There was policemen there all the time coming in and see me, asking me about him, and questioning me. They wanted me to name the other girls and things he had. I told him I did not know anything about any other girls.

Q. When was it, at the County Hospital, if you ever did, that you told the men from the Federal Bureau or Investigation that Mr. Smith sent you to Waynesville, Missouri?

A. That was after he showed me the telegram.

Q. Did you say that to them?

A. Yes; I did.

Q. Was that true or false?

A. Well, he did not send me. I was going anyway, but I did not have any money to go. I got the money from him to go. He did not send me.

Q. Do you mean you had made up your mind you were going?

A. Yes.

(Continued)

Q. To Waynesville, Missouri?

A. Yes.

Q. No matter what Mr. Smith said?

A. Well, I did not think he would stop me from going if I wanted to go. He did not try to tell me what to do and what not to do. He let me do what I wanted.

Q. When you called him up, was that for the purpose of asking for permission to go to Missouri?

A. Asking for money to go.

Q. Was that the only purpose of your call to him?

A. Yes.

Q. Why did you give a different impression when you testified or intend to give a different impression when you testified in court against him?

A. They had me all frightened. They told me I am on probation in Detroit. They said they were going to see I got some time out of it. I told them up at County, after they arrested me and took me to Rockford, the Rockford County jail, I said I would not testify against Mr. Smith. I said what I was doing, I was doing it before I even knew him. He did not entice me into anything. What I did was because I wanted to do it. The money, I gave it to him, I gave it to him because I wanted to, not because he put any pressure on me, which he did not. He never asked me for any money. I just gave it to him to take care of me. I was frightened. That was the reason why. I thought I probably would get some time out of it. I had two people to see me. They said I would get time from it, probation. I was out of town. I was frightened. Anything I could do to keep from going into the penitentiary, I would do it, but I said that was not the right way.

Q. Who frightened you?

A. Mr. Parrish was one.

Q. Who?

A. He did all the talking, and Mr. Conley, he tried to tell me, "We are not threatening you." He said, "Do not get the impression we are threatening you, but it could happen to you."

Q. What?

A. I would do some time if I got up and said—to find out I was prostituting for Mr. Smith.

Q. Did you ever tell Mr. Parrish or Mr. Conley anything contrary to what you have testified to? By that I mean, did you ever tell them that Mr. Smith did not send you to Waynesville, Missouri?

A. Yes; I did.

(Continued)

Q. When did you tell them that?

A. I told them that in court, the grand jury hearing, at the first hearing we went to. I told them that.

Q. When you went before the grand jury, you testified there that Mr. Smith did not send you to Waynesville, Missouri?

A. No. I told them I was going with some girls, some girls I was talking to that was going. They asked me to go along. I said, "Sure, but I do not have the money." I said, "I have to get some money," so I called Mr. Smith.

Q. Did you testify before the grand jury to the effect that you had to ask him for permission to go to Waynesville, Missouri?

A. I told them I called him, and they asked me, did he give me permission to go. I said, "No." I said, "I called to get some money to go." I did not have any money. That is what I said. He asked me. I told them. He asked me who was I going with. I told them, and that is all.

Q. Now, in reference to the second time you went to Waynesville, Missouri, did you have a conversation with Mr. Smith before you went there?

A. Yes.

Q. What was the conversation at that time?

A. I told them I was going back down there, I said, because I feel like I can make more money down there than I can here. He said, "Do what you want to do."

Q. Well, did he send you there?

A. Well, I got money from him to go there, but he did not send me there He did not take me to the station and buy me a train ticket and put me on the train. Wouldn't you say that was sending me if he took me to the train and bought me a ticket? He did not do that so I would not say he sent me.

Q. Was there any conversation to the effect that you could make more money down in Waynesville, Missouri?

A. I told him that. I knew I could. I did the first time there. I made more money than I was making in Chicago. I wanted to go.

Q. Were you in any way persuaded or enticed or induced?

A. No.

Q. Or coerced to go there?

A. No. That was why I want to do all I can to help him because he did not entice me to do anything I was not already doing.

(Continued)

Q. Well, from what you have told me just now, it would seem to me that part of the testimony that you gave against Mr. Smith was not correct?

A. That is right. It is not correct where I said he sent me there, that he told me to go there. He did not tell me to go there.

Q. Do you know, if you were to testify now that you lied on the witness stand, you would be in trouble? Do you know that?

A. I probably would, but wouldn't it be a way—the reason way—to tell a lie, I was trying to help myself, I mean, like telling them he sent me down there. Well, he did not send me down there, so the reason why I said he did, they said they knew he did send me because I sent my money back to him, and they had a witness to prove he sent me, that went with me to get the money to go. They told me about the witness.

Q. The point I want to make clear is, if you came back to court and testified the way you just testified to me—

Miss Jackson: I would be in trouble.

Q. You might be in trouble because you lied on the witness stand against Mr. Smith?

A. That is another thing to think about. Wouldn't there be a way I could have a lawyer to help me in that defense?

Q. Well, I am not concerned about that. I am concerned about whether or not you are telling me the truth or whether you told the court and jury the truth?

A. Yes.

A. Well, the things I said were the truth. The only thing I said that was not true was that he sent me to Waynesville. I think that was all the whole case was built upon.

Q. You say the statement you gave to the court was not true?

A. That he sent me; yes.

Q. Is that right?

A. Yes.

Q. Other than that, you testified truthfully?

A. Yes.

Q. Are you willing to come into court and repeat what you have told me even though it might mean you might get in trouble?

A. Well, I will tell you, before I would say that, I would have to see about getting me an attorney to advise me. I would like to help him if I could, but I mean, there are a lot of things I could not just write off and forget what happened to me on account of him. I lost an eye behind

[1] (Continued)

him, and I do not know, where I would rather go to jail and see him free. I do know how I would feel about it, to say I would go to court and testify for him.

Q. If I were to call you as a witness, would you repeat the same things that you told me?

A. Not if I feel like I am going to get into trouble. I think that there is nothing they could do to me if I felt like I wanted to change my testimony so he would not be in trouble.

Q. You cannot commit perjury. You cannot lie in court. I do not want you to. Is your statement that you have given to me that Mr. Smith did not send you there the truth?

A. That is the truth.

Q. That is the truth?

A. Yes.

Q. Would you repeat that to the Court?

A. I would rather talk to a lawyer for myself, my defense, before I would say. I probably would keep the same story if I felt like I was going into the penitentiary and if I had a lot to lose.

Q. What do you mean? I do not understand.

Miss Jackson: What I mean?

Q. I did not understand the last statement you made.

A. Well, I did not send for any FBI man. They bring up I was prostituting for Mr. Smith, but it happened like it did. I lost an eye. I was very angry with him. Anything I felt I could do to hurt him, I would do. Then I felt different afterwards, after I felt better and thought it over. I felt better, but they frightened me up, the fact that I was going to get a whole lot of time, anyway, on the probation. They said if I would go up there and testify that he sent me, they did not exactly put it in those words, but there was the menace there, they said they would see if they could help me. In other words, they are talking, but they are telling me I might get in some trouble. I do not want to get in any more trouble than I can probably help, so I think it would be much better for me to see a lawyer for myself and then come back and talk to you and maybe I can talk to you a little bit better than I can now.

Mr. Bellows: That is perfectly all right with me.

Miss Jackson: I think that would be the best thing for me to do.

Q. Where do you live now?

A. 643 West 61st.

Q. With whom do you live?

A. My father and mother.

[1] (Continued)

Q. Are you willing to swear what you said to me was the truth?

A. I just told you that I would rather see my lawyer first before I swear to anything.

Q. Has anyone asked you to come in and see me for the purpose of changing your story?

A. No. I called Mr. Smith myself and told him I wanted to see if there was anything I could do. I had not got a chance to talk to him before. I do not believe that, whatever did happen to me, it was really intended.

Q. Did you tell the truth when you were asked in court whether or not you had called him the night you testified to?

A. I did not call him that night.

Q. You did not call him that night?

A. No.

Q. Did you call anyone to convey a message to Mr. Smith that you were sorry you testified and you did it because you were afraid?

A. I do not think that was what I said. I called a friend of mine and Mr. Smith's and I told him, I said that these people were trying to tell me I was going to get some time in Detroit if I violate my probation. They told me how much I was going to get, and I said, "I am awfully sorry I had to testify against him." That is what I said.

Q. Who did you call?

A. I called Mr. Stepto, but he was not there. I think I talked to Mr. Smith's step father. I called yesterday, not last night, yesterday morning, I called Mr. Brown and talked to him about it.

Q. Who is Mr. Brown?

A. Before saying anything else, I think I would rather see my lawyer about it. I do not know if am hurting myself. I do not want to do that.

Q. You voluntarily called him yourself?

A. I did.

Q. And you voluntarily told him you wanted to come in and make a statement correcting your testimony? Is that what you told him?

A. Yes. That is, if it would help; yes.

Q. I still would like to know—

Miss Jackson: I would not want to say anything else. I will talk to my lawyer and come back and see you. I do not know. I cannot seem to get together with you to understand this trouble.

Q. I have advised you definitely that, if you change your testimony in court, you could be punished?

The Government submits that this is not the test on the question of inducement. In the statement given to Mr. Bellows the witness says that everything else she testified to at the trial was true except the defendant did not "send" her. He knew she was a prostitute, he knew she was going to Waynesville and O.K.'d it the first time and ordered it the second time; he furnished her with money to buy her railroad ticket, and he confiscated her earnings.

Even if what the victim said in her affidavit were true, the jury would have reached the same conclusion.

(c) Was the defendant taken by surprise? Counsel for the defendant had interviewed the witness at the Rockford jail before trial and knew exactly what her testimony would be.

Interesting language appears further on in the *Larrison* case at page 88, where the Court cites *People* v. *Shilitano*:

---

[1] (Continued)

A. I know that.

Q. You could be punished for perjury or for contempt, and I warned you of that because you are telling me that you did not testify correctly in the first instance.

A. Well, I think, before I say anything else, just like I said, I would rather talk to my attorney, also. I have nothing else to say.

Q. If you were called into court—

Miss Jackson: I do not know whether I would testify like that or not. I am not going to say because I thought maybe I could help Mr. Smith out if I come in and we tried to see if we could get together on something to help him, but to destroy myself, no.

Q. Would you be willing—

Miss Jackson: I am saying I will not say anything more until I talk to my lawyer. I will not say I am willing to do anything. I will tell my lawyer just what I told you.

Q. Who is your lawyer?

A. I have talked to two or three lawyers now. I do not know exactly which one I will talk to. I will let him let you know who he is.

Mr. Bellows: O. K.

• • •

" 'Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice. I do not wish to be understood as urging that the fact of recantation is not to be considered by the court in weighing the testimony upon which the defendant was convicted, but I wish to make clear the fact that recantation in and of itself does not necessarily require the court to order a new trial. Such being the case, whether or not a new trial should be granted must depend upon all the circumstances of the case, including the testimony of the witnesses for the people, submitted on the motion for a new trial, in which these witnesses recant the testimony which they gave upon the trial.'

"Speaking of the duty of the court where defendants have offered the sworn recantation statement of a witness for the prosecution the court says:

" 'But if, on the contrary, he (the judge) was convinced that the second testimony was false, that a criminal league had been formed to set at naught the verdict of the jury and the judgment of the court, his duty was clearly marked. He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumphant. He was charged with the responsibility to seek the truth himself.' "

In the case of *Martin* v. *United States*, 5 Cir. (1927) 17 F. 2d 973, cited by defendant, the verdict was affirmed and the Court warned of suspicious circumstances surrounding the execution of such affidavits.

Note the circumstances here. The defendant knocks out the eye of the witness in a fight in Washington Park. The

following day she tells her story to the F.B.I. A couple of weeks later, before being contacted again by the defendant she tells substantially the same story to the United States Attorney and under oath to the Grand Jury. She repeats her story, again under oath, before the jury. Two days after the verdict she appears in the office of defendant's lawyer *in the company of the defendant* and says she wants to change her story. But she wants to change it in only one regard. Isn't it strange that it has to do with the question of inducement?

Even if the motion were sufficient, new trials are granted only with great caution, *U. S.* v. *Pruitt*, (1954) 121 F. Supp. 15, affirmed 217 F. 2d 648, and a motion for a new trial is addressed to the sound discretion of the trial court, *Adams* v. *U. S.*, 9 Cir. (1951) 191 F. 2d 206, and will be reviewed only where there is a clear abuse of discretion. *Apodaca* v. *U. S.*, 10 Cir. (1951) 188 F. 2d 932.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the judgment and conviction of the defendant, Grant W. Smith, should be affirmed.

Respectfully submitted,

R. Tieken
United States Attorney

John Peter Lulinski
Assistant United States Attorney

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Assistant United States Attorney
Of Counsel.

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APPENDIX.

TESTIMONY OF CLERK JOHNSON ON CHALLENGE TO THE ARRAY

To obtain names for the one half the jurors selected by Clerk Johnson, he wrote for lists of prospective jurors to Catholic, Jewish and Protestant churches (R 27); Negro churches (R 24 & 25); Labor Unions, Veterans organizations, Parent Teacher Associations, Women's Clubs, Rotarys, Lions, Elks, and Odd Fellows (R 28); Postmasters (R 24 & 23); Urban League (R 29); Y.M.C.A. (R 25); St. Kilian Society (R 48) Catholic Parochial School (R 49); and used names recommended by previous jurors (R 37), volunteers and names recommended by people the Clerk knew. (R 43)

The Clerk always has a surplus of questionnaires (R 40). Those which are placed in the wheel are balanced so that 50 per cent of the names are supplied by Commissioner Crooks and 50 per cent by Clerk Johnson. (R 40) A geographical balance is also maintained. (R 29, 40)

From the lists of questionnaires on hand those to be placed in the wheel are selected in different ways. They are sometimes selected alphabetically, sometimes by the latest date on the questionnaire and sometimes by selecting every 5th or 20th questionnaire. (R 41) No effort is made to break Chicago down on a neighborhood basis but the rest of the county is given representation by selecting one or two jurors from each different town. (R 41)

Clerk Johnson testified that he had envelopes *full* of *lists* from which the names of prospective jurors are drawn. (R 43)

To the best of his recollection, several thousand questionnaires were returned to the Clerk in 1956. (R 44)

The Clerk testified that the figure of 50-60 per cent of his one-half of the names added in 1956 which was made up of volunteers, and people recommended by former jurors or friends was purely guesswork. (R 51)

On January 1, 1957, Clerk Johnson had a large supply of questionnaires on hand (R 26) but was short of the names of Negroes so he wrote to Negro churches and organizations so that he could maintain the racial balance.

The Clerk watches the wheel closely to prevent an accumulation of old names. A recent check revealed that 90 per cent of the names in the wheel were questionnaires from 1955, 1956 and 1957; there were two from 1952 and a few from 1953 and 1954. (R 55)

When questionnaires are placed in the wheel there is no indication from which list the name was taken (R 61) and no class is excluded because of religion, race, wealth, education (R 29) or for social, political or geographical reasons. (R 66A)

In the time Mr. Johnson has been selecting jurors since 1942 he can recall only three whose names were submitted to him by employees of the United States Attorney. (R 63)

TESTIMONY INTRODUCED ON BEHALF OF PROSECUTION

Mae Francis Norwood testified that she is also
98 known as Faye Jackson and Louise Young, that she was a prostitute and had been convicted of possession
99 of marijuana and served 30 days in jail and was placed on probation for 2 years. She testified that she was not a narcotic addict and never had been.

She met the defendant several months prior to the trial at the Pershing Hotel. They had a conversation and found out who each other were.

A week or two later they had another conversation. The defendant talked of their "relationship" with each other. He asked who her "boy friend" was and she said she had none. That is how they got together and she decided to be his "girl friend." Norwood testified she was defendant's "girl friend" 4 or 5 months.

On or about January 30, Norwood took a trip to Waynesville, Mo. Some girl friends were going and asked her to go along. They were in a restaurant at the time and she telephoned the defendant. She told him she wanted to go to Missouri with her girl friend Joanne. He said it was O.K. with him if she wanted to go. She told defendant she didn't have any money to go and he told her to come by the house and get some. She went to his apartment and he gave her $15. (R 110)

The witness and two women known as Joanne and Bertha boarded an I. C. train at 63rd St. Station in Chicago, Illinois, and went to St. Louis, Mo. The girls took a bus to Waynesville and a taxi from Waynesville to the Cactus Club. (R 111) That night the witness committed acts of prostitution from which she earned $219.00. She returned to Chicago the next day and gave defendant $195.00 of this money. (R 113)

On or about February 27, 1957 the witness and defendant had another conversation about going to Waynesville, as follows: "Well, he just told me, at least we both were talking about it, going back down to Waynesville, because he said there wasn't any

money in Chicago, and that was a nice time to go, and I didn't want to go by myself, and he said it would be all right for me to go by myself, and he give me money to go."

Defendant gave the witness $20.00. She purchased a ticket at the 63rd St. Station and took an I. C. train to St. Louis, arriving the following morning. She met Bertha and another girl at the Bus depot but they missed the bus and friends of Bertha drove them to the Cactus Club in Waynesville. (R. 116) The witness met two girls she knew at the Club, one named Frances and one named Jackie. The witness committed
117 acts of prostitution from which she earned $175.00. She returned to St. Louis and called the defendant,
119 telling him she was sending money home. She sent $100 by Western Union money order. (R 120) The witness went to the Midland Hotel in St. Louis from the train station. After 3 or 4 hours, she and 4 other girls took a taxi back to Waynesville. The police were around so the witness returned to St. Louis and took an I.C. train to Chicago. She had a conversation with defendant upon her return and they talked about "things wasn't as nice as before when
124 I went."

On cross-examination, Norwood testified that her felony conviction was in Detroit. She stated that she never borrowed any money from the defendant to go to Detroit but that she had asked him for money to
129 go. She met the defendant at the Pershing Hotel. She never saw him working as a bartender and
132 thought he owned the place. She had been drinking when she met the defendant. The witness talked to Mr. Connelly, the Assistant U. S. Attorney, two or three times, the first time in March 1957. Her

134 testimony was the same as when she talked to Connelly the first time, with maybe a few changes. (R 135)

Connelly talked to the witness at the Rockford
137 County Jail the next time she talked to him. Mr. Connelly told her to tell the truth. (R 138) The witness testified that defendant asked her to stop
150 prostituting because he wanted her to learn to shop-
151 lift. She said she did not know how to shoplift, that all she knew was prostituting. Both the witness and defendant had been drinking at the Pershing lounge.
156 From there the witness testified they went to "The apartment he had for me." The defendant wanted the witness to work as a shoplifter (R 158) and said he didn't like a prostitute. The witness was mad at the defendant who threw a bottle at her and caused
159 five stitches in her face.

Frances Mae Shipp testified that she was a pros-
162 titute and met Faye Jackson (Norwood) at the Cactus Club in Waynesville, Mo., on February 28, 1957. (R. 163) The witness returned to St. Louis by Greyhound bus with Faye Jackson, who sent a Western
164 Union money order. She saw her give a lot of bills to the Western Union clerk. (R. 166) She and four girls, including Faye Jackson, missed the bus back to Waynesville the next day and they took a cab.
169 The driver charged $5.00 apiece for the trip.

175 Joanne Bigham testified she was a prostitute and had been convicted for receiving stolen property (R. 176) and did not know the defendant personally. On January 30, the witness met Jackson and "Pony Tail" at the Clover Club at 63rd and Cottage. She saw

Faye Jackson make a phone call about 8:00 P.M.,
178 and then she and Jackson took a cab to 51st and Ellis. The witness waited in the cab while Jackson went into the building at 5100 Ellis Avenue. Jack-
179 son came out in about 10 minutes. After stopping at the Pershing Lounge they boarded an I. C. train
181 at 63rd Street to go to St. Louis, Mo. The witness, Jackson and Pony Tail took a bus to Waynesville, Mo., and a taxi from the bus station to the Cactus Club and committed acts of prostitution. She re-
185 turned to the home of Pony Tail's mother the next morning and returned to Chicago in the afternoon via the I. C. R. R. On February 28, 1957, the witness returned to St. Louis with Frances Shipp, Frances Hamilton and Jackie Phillips (R. 187). They checked their luggage at the Railroad Station and took a bus to Waynesville. She met Faye Jackson either at the
189 bus station or the Cactus Club and performed acts of prostitution. When they returned to the Railroad Station in St. Louis, she saw Faye Jackson go to the
192 telegraph counter. She stayed in a room at the Midtown Hotel that day with Faye Jackson and Jackie Phillips. She and Faye Jackson, Jackie Phillips, Frances Shipp and Frances Hamilton returned to the Cactus Club the night of March 1, by taxi, paying the driver $5.00 apiece. They returned to St. Louis by the same cab and returned to Chicago on the
193 I. C.

Geneva Washington, also known as Jackie Phlilips, testified she was a prostitute and met Faye Jackson in Detroit a number of years ago. On February 27, 1957, she took the I. C. train to St. Louis. On the train she met Joanne, Frances Shipp and Frances

Hamilton. She met Faye Jackson, also known as
201 Louise Young, at the railroad station in St. Louis. They took a bus to Waynesville and taxi to the Cactus Club. After work that night she returned to St. Louis and saw Faye Jackson fill out an applica-
204 tion for Western Union money order for $100.00. That afternoon they returned to Waynesville by cab,
206 the driver charging each girl $5.00. She returned to St. Louis by cab and took the I. C. train back to Chicago (R. 208). She testified she had been convicted of shoplifting.

By stipulation it was agreed that Western Union Money Order # J T 72338, for $100.00, dated March 1, 1957, was telegraphed from St. Louis, Mo., and was received by, endorsed by and deposited by the
214 defendant. Grant Smith, who received the money.
217 The money order was received in evidence as Government's Exhibit 2.

It was stipulated that the I. C. Railroad was a
218 common carrier.

Frances Hamilton, also known as Holladay, testified that she is a prostitute; that she met Faye Jackson on March 1, 1957, on a Greyhound bus going from
220 Waynesville, Mo., to St. Louis and that Jackie Phillips and Frances Shipp were on the bus. She testified that when they arrived in St. Louis she saw Faye Jackson write out an application for a money order
221 and hand the clerk several bills. She testified that she returned to Waynesville by taxi, paying $5.00 each for the fare; she engaged in prostitution at the Club, then returned to St. Louis where she boarded
225 an I. C. train for Chicago.

Thomas W. Parrish testified that he was a Special Agent of the Federal Bureau of Investigation and had investigated the defendant; that defendant lived at 5100 S. Ellis Avenue, Chicago, and there was no other Grant Smith listed at that address. He testi-
226 fied that he took the defendant into custody. He testified that defendant denied knowing anyone by the
230 name of Jackson or Louise Young. Frances Norwood, also known as Faye Jackson or Louise Young, was recalled for further cross-examination.

She testified she did not call the defendant on the phone after the court the previous day. The witness
234 was not aware that an order of discharge had been entered the previous day; she testified she went home after court adjourned. She testified she was arrested because she did not let them know where she was (R. 236). She said Mr. Parrish told her if she didn't testify against the defendant she would be in contempt of court, or something, or perjury, or something. She thought if she did not testify she might go to jail. She said the thought of going to jail for five years frightened her.

Thomas W. Parrish was recalled as a witness by the Government. He testified that he did not tell Miss Jackson that she would be put in jail for five years for perjury if she refused to testify against
238 the defendant and that he did not tell her she would be put in jail at all for any period of time if she refused to testify.

On cross-examination Mr. Parrish testified that he never told Mrs. Norwood that she would be held in contempt of court if she didn't testify. He did not
239 tell her what the effect would be of her refusing to testify against Mr. Smith. He did not write down all

the things that were said between himself and Mrs. Norwood and had never spoken to her alone. There were various agents present at different times. Agent Boner was with him when he first spoke to Miss Jack-
240 son at the County Hospital. Agent Boner was with him the second time he talked to Jackson in the vestibule of the U. S. Attorney's office. The next time he talked to the witness on April 20, at the Manor House Hotel in Chicago (R. 241), in the presence of Agent Don Peterson. The next time he spoke with the witness was at Rockford, Illinois. Jackson had
242 told him she didn't want to appear in court. He told the witness that if she did appear in court and did not tell the truth, she could possibly be held for perjury. Mr. Parrish did not tell Miss Jackson what would happen if she did not testify at all.

On redirect Mr. Parrish said that he told Miss Jackson that if she took the stand she should tell the truth regarding her association with the defendant, because if she did not tell the truth, she would be subject to possible perjury charges and possible
244 contempt of court.

The Government rested its case.

Motion for judgment of acquittal was made.

246 By Mr. Bellows: "My impression is, your Honor, from carefully reading the testimony in this case, that there just isn't sufficient to prove beyond all reasonable doubt that he is guilty of this offense."

By the Court: "I think he is. I think there is sufficient evidence to show he is guilty of it. If you weren't moved by the enthusiasm of your position, you probably would think so."

The motion was denied.

Testimony for Defendant.

247 Grant Smith testified that he lived at 5100 S. Ellis Avenue, Chicago, Illinois; was 39 years old; was born in Montgomery, Ala., and finished the 9th grade. He worked as a delivery boy, came to Chicago in 1937, and worked as a laborer, elevator operator and bartender; that he presently manages a tavern and formerly owned one. He said he met Mrs. Norwood in December 1956, at the Pershing Lounge. He met her again three weeks later at the same place and she told him she lived in Detroit, had been married and had a couple of kids, and was going to modeling
250 school. He said he did not know she was a prostitute. When he saw her the second time she said she had been in trouble in Detroit and had to report each month for probation. She missed one month report-
252 ing for probation. She asked him for $150 to straighten out her probation (R. 253). He gave her $100 on about January 27, and saw her again about 12-14 days later. Defendant said he didn't know that Mrs. Norwood had gone to Waynesville, Mo., but told him she was going to Detroit. She called him and said she was out of town and was going to send him
255 money. He did know the money order came from Waynesville. He said he surrendered to the Federal Bureau of Investigation.

257 Smith denied receiving $195 from Mrs. Norwood. He quarrelled with her in March and denied he told her to go to Waynesville. He learned in March that
258 Mrs. Norwood was a prostitute. Smith said he talked to Mrs. Norwood about her being a prostitute about three days later in the Pershing Lounge. Mrs. Norwood first denied she was a prostitute, but after some
261 drinks, while at her house she admitted it. He said

he didn't like prostitutes and she threw a glass of whiskey at him. He threw the bottle at her which struck her. He said she was mad and told him she would get even. Smith said he did not see her after
261 that until he saw her in Court. Smith said that Mrs. Norwood called him the night before he took the stand and said she was sorry she testified against
262 him but she would get five years if she didn't testify.

Smith testified that he surrendered to the F.B.I. and they told him he was under arrest for sending Faye Jackson or Louise Young to Waynesville. He said he did not know Mrs. Norwood by either name and denied sending anybody any place. He denied that he ever persuaded, enticed, induced or coerced
263 Mrs. Norwood to go to Missouri for the purpose of engaging in prostitution.

On cross-examination Smith said he lived with his mother at 5100 S. Ellis Avenue and was employed as manager of the Pershing Lounge on a salary basis.
264 He said he did not notice that the Western Union money order, Government's Exhibit 2, stated thereon that it was "Telegraphed from St. Louis, Mo." He said he took it for granted it was from Michigan, because he thought she was going there. He said the long distance operator did not talk to him when he received the call from Missouri (R. 265). He said when he picked up the phone he talked directly to Mrs. Norwood and he did not remember if someone said "This is a long distance call" or "Will you accept a call from St. Louis."

He said he did not know if the scratch Norwood
267 received from the thrown bottle required any stitches. He said his mother, stepfather, a nephew and roomer

lived with him in an 8-room apartment at 5100 Ellis. He said there had been other roomers at times and had no other occupation than that of manager of the Pershing Lounge.

270 The defendant rested his case.

Motion for judgment of acquittal at the conclusion
271 of all the evidence was denied.

275 The prosecutor cautioned the jury that anything he said which did not reflect their own recollection as coming from the witness stand was to be disregarded.

330-338 Charge of the Court.

Thereafter the jury returned the following verdict: "We the jury find the defendant gailty as charged
345 in the indictment."

Motion for new trial was made and continued to June 27, 1957.

On motion for a new trial the following proceedings took place:

354 Mr. Bellows informed the Court that a day or two after defendant was found guilty, Mr. Smith called him and said Faye Jackson wanted to talk to him. He agreed to talk with her and had a court reporter present when the defendant brought her in. She said she wanted to change her story, that part of what she said in court was not true, the part in which she said the defendant sent her to Missouri. Mr. Bellows said he warned her that the Court might consider that to be perjury or contempt, and she said in that case she would like to consult with an attorney. Shortly after that Jackson talked to two lawyers and gave them an affidavit which he filed. Mr. Bellows

advised Mr. McGarr and Mr. Connelly of the witness' change of heart and furnished them a copy of the affidavit and a copy of the transcript of Jackson's testimony in his office. (R. 355)

Mr. Bellows said he was ready to put Jackson back on the stand about the change in her story and that was his chief point in the motion for new trial (R. 356). In addition there was a challenge to the array. Mr. Bellows said the prosecutor failed to prove many things set forth in the opening state-
358 ment. He then discussed the evidence.

Mr. Connelly pointed out that paragraph 7 of Jackson's recantation was the only thing relating to the testimony of the witness at the trial and it referred to the defendant sending the victim to Rockford, which was not charged by the Government in the
359-360 indictment.

In the statement the witness gave Mr. Bellows in his office she said everything she said at the trial was true except that Smith did not tell her to go to Missouri or send her, that it was her own idea.

Mr. Connelly cited McGuire *vs.* U. S., 152 F. 2d 577,
361 on the question of inducement.

The case of U. S. *vs.* Barton, 34 F. 2d 484, was cited and language from page 485 quoted to the Court.

The affiant's interpretation of what constitutes sending her to Missouri is obtained by reading the following from page 8 of the statement taken by Mr. Bellows at his office after the trial (R 363):

"Q. Well, did he send you there?"

"A. Well, I got money from him to go there, but he did not send me there, he did not take me to the station and buy a train ticket and put me on the train. Wouldn't you say that was send-

ing me if he took me to the train and bought me a ticket? He did not do that, so I would not say he sent me."

Mr. Connelly cited the case of U. S. vs. Reed, 96 F. 2d 785, where the jury found inducement even though the witness testified she always wanted to go where she went and paid her own transportation.

The case of Larrison vs. U. S., 7th Cir., 24 F. 2d 82, was cited in relation to recanted testimony (R 364).

The case of Martin vs. The U. S., 17 F. 2d 973, was cited in connection with the suspicious circumstances surrounding the obtaining of the affidavit from Wit-
368 ness Jackson.

A material witness warrant was obtained because
369 Jackson had eluded police guards at her home and disappeared.

In connection with the granting of a motion for new trial Mr. Connelly cited U. S. vs. Pruitt, 121 F. Supp. 215, Aff'd. in 217 F. 2d 648, for the general proposition that even if the motion were sufficient, new trials of criminal prosecutions are granted only with great caution; (R 370) and that a motion for new trial is addressed to the sound discretion of the Court, Adams vs. The U. S., 191 F. 2d 206; and that the ruling will be reviewed only where there is a clear
370 abuse of discretion.

Mr. Bellows offered to call the witness Faye Jackson in regard to the recantation and this colloquy
374 took place.

By the Court: "You put her affidavit in, I assume you regarded that as sufficient when you filed it.

By Mr. Bellows: Yes, your Honor.

By the Court: I assume she would say the same thing if she were on the stand."

Thomas W. Parrish, Special Agent of the F.B.I., was recalled as a witness by the Government. He
375 testified that Faye Jackson never told him that Smith did not send her to Waynesville, Mo., and that he told the witness Jackson to tell the truth at the trial. The witness said he never made the following statement: "But it is not fair. If somebody tried to knock your eye out, wouldn't you do whatever you could to see he was punished for it?" He did not exhibit a
376 telegram to Faye Jackson at the County Hospital and she was not contacted six times at the hospital, but three times (R 377).

Q. On page 6 of the statement given by the witness after trial to Mr. Bellows the question was asked:

> "Why did you give a different impression when you testified or intend to give a different impression when you testified in court against him?
>
> A. They had me all frightened. They told me I am on probation in Detroit. They said they were going to see I got some time out of it. I told them up at County, after they arrested me and took me to Rockford, the Rockford County jail, I said I would not testify against Mr. Smith. I said what I was doing, I was doing it before I even knew him. He did not entice me into anything. What I did was because I wanted to do it. The money, I gave it to him because I wanted to, not because he put any pressure on me, which he did not.
>
> "He never asked me for any money. I just gave it to him to take care of me. I was frightened. That was the reason why. I thought I probably would get some time out of it. I had

two people to see me. They said I would get time from it, probation.

"I was out of town. I was frightened. Anything I could do to keep from going into the penitentiary, I would do it, but I said that was not the right way."

Q. "Did you mention anything to this defendant (sic Jackson) at the Rockford County Jail about probation?

A. "I knew nothing of her probation until she volunteered it. Then later I sent to our Detroit office and had it verified."

Agent Parrish further testified that Jackson never told him that Smith did not send her to Missouri and that he never told her to testify that Smith sent her to
379 Missouri. He told her to tell the truth.
380 By the Court: "Motion for a new trial will be overruled and denied. This witness—what is her name?"

By Mr. Connelly: "Faye Jackson."

By the Court: (Continuing)

"Faye Jackson is unquestionably under the control of this defendant. The emotion she feels toward him she doubtless calls and characterizes as love, and she doubtless calls him her sweetheart. There isn't any question about it, she was and is a prostitute.

"I am satisfied that this defendant was living off her earnings, taking her earnings from her, and was not treating her very well at that.

"Undoubtedly she will say when she gets under his influence just exactly what he wants her to say. I have not got the slightest doubt about
381 that.

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the the earnings of this woman, and I am sure that he induced her to change her story.

"I have never yet sentenced a man, fined him or sent him to jail or sent him to the penitentiary unless I was satisfied beyond all reasonable doubt that he was guilty, and that is what I feel about this man. If I did not feel that way I would not fine him, I would not sentence him, I would not put him on probation, I would not convict him.

"I am satisfied beyond all reasonable doubt this defendant is guilty of the crime of which the jury found him guilty."

(R 382) By the Court: "Let the defendant be committed to the custody of the Attorney General for a period of five years on Count 1 and let him be committed to the custody of the Attorney General for a period of five years on Count 2. Let the sentences run concurrently."

392 Certificate of the Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 985

GRANT W. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

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Petition for Writ of Certiorari

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 27, 1958.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported; the unreported opinion is included herein as Appendix I.

STATEMENT OF JURISDICTION.

The judgment of the United States Court of Appea for the Seventh Circuit, in this matter, was entered February 27, 1958; a petition for rehearing was filed petitioner within the proper time, as provided for rule of said Court of Appeals, and the order denying sa petition for rehearing was entered April 8, 1958. T Jurisdiction of the Supreme Court of the United States invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Whether the petitioner was accorded a trial by jur which was truly representative of the State and distric wherein the crime was committed where the Clerk of th United States District Court for the Northern District o Illinois, who by law chooses fifty percent of all person to be called for jury service, testified at the hearing o the petitioner's challenge to the array of the petit jury that fifty to sixty percent of all names of persons whic he deposited in the jury box were taken from name recommended by other jurors or were volunteers; that the remainder were taken: from names recommended by postmasters in the district and by members of the United States Attorney's office and other persons employed in the Federal Court House; from a list of members of the St. Kilian Society given to him by a deputy clerk; a list of parents of pupils in a parochial school; lists furnished him by his secretary; and lists of parent teachers associations furnished by his wife.

STATUTES.

Constitution of the United States
Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . .

United States Code
Title 28, § 1861:

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

Illinois Revised Statutes (1957)
Chapter 78, § 13:

. . . Any person who seeks the position of a juror, or who asks any attorney or other officer of the court or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge . . .

STATEMENT OF THE CASE.*

The March, 1957, Grand Jury of the Northern District of Illinois, Eastern Division, returned an indictment against Grant Smith, defendant, in which he was charged in two counts with violation of Section 2422, Title 18, United States Code, commonly described as White Slave Act. Both counts are the same except that they relate to acts which occurred on two dates to-wit: January 31, 1957, and February 28, 1957. The indictment charges that Grant Smith, defendant, knowingly persuaded, induced, enticed and coerced a woman, one Mae Frances Young, also known as Faye Jackson, to go from Chicago, Illinois, to Waynesville, Missouri, for the purpose of prostitution, debauchery and other immoral purposes, and thereby knowingly caused said woman to go and to be carried and transported as a passenger upon a common carrier in interstate commerce from Chicago, Illinois, to Waynesville, Missouri, in violation of Section 2422, Title 18, United States Code.

The defendant was tried by a jury and was found guilty of the charges contained in the indictment. The motion for a new trial was denied and the defendant was sentenced to the custody of the Attorney General for a period of five years, upon each Count, the sentences to run concurrently.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit which reversed the conviction under Count 1 and affirmed the conviction under Count 2 of the indictment.

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*The letter "R," followed by a number, refers to the pages of Appellant's Appendix as prepared for use in the United States Court of Appeals for the Seventh Circuit.

Motion challenging the array.

A motion was made prior to the trial challenging the array of the petit jury. (R. 3) The affidavit in support of a motion challenging the array of the petit jurors (R. 6-10) stated (1) that 65% of the names of prospective jurors are obtained by recommendations of former jurors; (2) that Roy Johnson, Clerk of the United States District Court, during the years 1954, 1955, 1956, did not address any communication to any person, corporation, or organization with reference to securing names of persons for jury service other than 3 churches and four small town postmasters; (3) that some of the prospective jurors whose names are deposited in the jury box were recommended by persons in the United States Attorney's office in this district; (4) that the array of petit jurors do not constitute a fair representative cross section of the community; (5) that the officials in charge of the jury selection procedure utilized methods in the selection of the petit jurors whereby they arbitrarily, intentionally or systematically excluded various classes of people who are eligible and qualified for general jury service; (6) that the officials in charge of the jury selection procedure of this court illegally and improperly delegated their duties in connection with the selection of the petit jurors; (7) that the population of the Northern District of Illinois exceeds six million persons, but that since 1950 and at the present time, jury panels are selected from a list of prospective jurors never exceeding two thousand names. The government did not file an answer to this affidavit.

Roy Johnson, Clerk of the United States District Court, testified at the hearing on the motion challenging the array of the petit jury. The other jury commissioner, Harry Crooks, was ill and did not testify. Johnson testified that he and Crooks placed in the jury box an equal number of names of prospective jurors (R. 12). During the year,

1956, the only requests he made for names of prospective jurors were directed to three or four Negro churches and some postmasters of the district (R. 12). He received forty or fifty names from the Negro churches (R. 12), one hundred to two hundred names from the postmasters (R. 36), and perhaps five hundred names of persons recommended by previous jurors (R. 12). He also obtained names from a list of the St. Kilian Society brought in by a deputy clerk, a list of parents of pupils in a parochial school, lists given to him by his secretary, and lists, furnished by his wife, of parent teachers associations (R. 12).

Johnson testified that he received several thousand questionnaires during the year, 1956, but did not know exactly how many. In 1956, there were deposited in the jury box the total of 1934 names. On April 8, 1957, and on May 8, 1957, there were deposited 450 and 514 names respectively. At the time he drew the panel for the petit jurors for the month of June, in which the present case was tried, he also drew the grand jury panel. There were only 1402 names in the box at the time he made the drawings of names of jurors for service during the month of June (R. 12).

Johnson further testified that fifty to sixty per cent of all jurors' names he deposited in the jury box were taken from names recommended by other jurors or by friends, people around the building, and volunteers (R. 13). He testified that three jurors were recommended by the members of the United States Attorney's office, two of them during 1957 (R. 13).

In 1957, he wrote to four Negro organizations, including 3 churches. The jurors selected to serve for the month of June were drawn on May 15, 1957, and they came from the same source that he had described for the

year, 1956. He did not write to churches having white membership (R. 13). He did not know whether he wrote to any postmasters for names from January 1st, 1957 to May 15th, 1957. The names of jurors drawn to serve for the month of June, 1957, were drawn from the names he had deposited as his half of the total number (R. 13).

On cross examination, he testified that he did not systematically or intentionally exclude any economic, social, religious, racial, political, or geographical group. He did say, however, that he did not have sufficient clerical help to take names from polling lists and directories (R. 13).

Under the questioning of the court, he testified that over the past twenty five years, as Clerk of the United States District Court, he had written to Catholic, Jewish and Protestant Churches, labor unions, veteran organizations, parent teacher associations, women's clubs, rotaries, Lions, Elks and Odd Fellows. He had always written to postmasters in the outlying counties. He had also written to officers of labor unions (R. 13). When he was asked whether he had received answers, he made the following reply:

"Well, over the years I have had answers from some of all of those organizations. That is, some of the labor unions, some of the pastors answered. There are some who don't answer. I don't write again. I write once, and if they don't answer, that is it, except the Chicago Urban League. I have written to them several times" (R. 13).

The Court, at the conclusion of the hearing, overruled the motion challenging the array (R. 3, 14).

BASIS FOR FEDERAL JURISDICTION.

The proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, were instituted by indictment, returned by the Grand Jury in and for said District and Division, against the petitioner for violation of Title 18 U.S.C. § 2422.

REASONS FOR GRANTING WRIT.

The defendant was deprived of a jury selected from a truly representative group of the community as guaranteed to him by the Sixth Amendment to the Constitution of the United States.

The testimony of Roy Johnson, Clerk of the United District Court, that in 1956 and 1957 he communicated with only three and four Negro churches respectively and some postmasters in the district to obtain names for jury service; that forty percent of the jurors whose names he chose were selected from a list of parents of pupils of a parochial school, unidentified lists made by his secretary; and lists of parent teachers groups furnished by his wife; and that the remainder of the jurors where chosen from recommendations of previous jurors, postmasters and volunteers does not show regard for the established concept of trial by jury.

It would thus appear that unless one belonged to a particular association favored by the clerk, or was recommended by a former juror or a postmaster, or volunteered for jury service, he would not be called. The clerk in following the methods we have called to the attention of this court excluded from jury service the overwhelming majority of the population of the District.

In *Glasser* v. *U. S.*, 315 U.S. 60, 85, the court said:

> "Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner . . . This duty of selection may not be delegated . . . And, its exercise must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class.
>
> • • •
>
> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

The standards to be employed for the selection of jurors stated in the *Glasser* case were reiterated in *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, and *Ballard* v. *U. S.*, 329 U.S. 187.

The method of the selection of jurors in the Northern District of Illinois, Eastern Division, violates the requirements of jury trial as recognized by this Court in the *Glasser* case. The choosing of jurors from recommendations of former jurors or from selected organizational lists results in a systematic exclusion of many hundreds of thou-

sands of eligible persons. The selection of jurors from persons recommended by former jurors limits the choice to a small self-perpetuating group. The selection by the clerk of jurors recommended by the personnel of the United States Attorney's office would procure a panel favoring the prosecution.

Title 28, U.S.C. Section 1861 provided (as it read at the time of the selection of the jury in this case) that jurors selected must be competent to serve as jurors under the laws of the State in which the district court is held. The jurors selected as volunteers were not competent to serve as jurors under the Statutes of Illinois. Chapter 78, Section 13 Illinois Revised Statutes provides that any person who seeks the position of a juror shall be deemed guilty of contempt and fined not exceeding twenty dollars.

The use of lists of private organizations although condemned in the *Glasser* case has not been changed. Any given panel of prospective jurors should be selected from lists of names impartially drawn and not from lists supplied by organizational groups. All qualified persons in every stratum of society must be eligible to serve as jurors. The Clerk should not arbitrarily limit eligibility for jury service, nor should it be delegated to heads of organizations to decide which persons are eligible. And there is the ever present possibility that a Clerk or an organization head might intentionally or unintentionally exclude from jury service large groups which should not be excluded.

The Court of Appeals completely ignored the dictum of the *Glasser* case that the selection of jurors from particular private organizations does not conform to the traditional requirements of trial by jury. It further ignored the evidence and based its opinion on the completely self-serving statement of the Clerk that he did not discriminate

against any economic, social, religious, racial, political or geographical group. This conclusion by the Clerk cannot be considered to be correct when viewed in the light of his other testimony which proves conclusively that his method of selecting jurors did discriminate against the overwhelming majority of the population of the Northern District of Illinois.

The opinion of the Court of Appeals, where it holds that volunteer jurors must be challenged for cause upon *voir dire,* is contrary to the holdings of this court in the case of *Thiel* v. *Southern Pacific Company,* 328 U.S. 217. In the *Thiel* case it was expressly held that it is immaterial that the jury which actually decided the factual issue in the case conformed or did not conform to the requirement that it represent a true cross-section of the community. The evil lies in the wholesale exclusion of the majority of the population of the district from jury service. See also *Dow* v. *Carnegie Illinois Steel Corporation,* (3 Cir., 1955) 224 F. 2d 414, where the United States Court of Appeals for the Third Circuit directed that the use of volunteers on juries be abolished.

The Court may, we believe take judicial notice of the fact that there are numerous cases now pending in the United States District Court for the Northern District of Illinois, Eastern Division, in which the identical problem has been raised. A decision in this case would alleviate the necessity for the question to be litigated over and over again in the District Court and the United States Court of Appeals for the Seventh Circuit. An informal communication from the Clerk indicates that he has been called to testify in five such cases and that there are an unspecified number of cases in which similar challenges to the array of petit jurors have been made by defendants in which a stipulation has been entered into between

counsel that the testimony of the Clerk of the United States Court would be the same as in the present case.

There is no case in which this Court has decided the precise question presented here. The *Glasser* case contained a dictum as to the use of jurors from selected organizations, the *Thiel* case concerned the exclusion of daily wage earners and the *Ballard* case concerned the exclusion of women from jury service. We believe that it is important to the administration of justice that this Court should grant our petition for writ of certiorari in order that it may review this question.

CONCLUSION.

For the above and foregoing reason we respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above cause.

Respectfully submitted,

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JASON ERNEST BELLOWS,
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On the Brief.

APPENDIX I.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12699 SEPTEMBER TERM 1957 - JANUARY SESSION 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
GRANT W. SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.

February 27, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON,
Circuit Judges.

PARKINSON, *Circuit Judge.* The defendant was charged in a two count indictment with violations of the White-Slave Traffic Act, Title 18 U.S.C.A. § 2422. Count One charged a violation on or about January 31, 1957 and Count Two on or about February 28, 1957.

Trial was to a jury resulting in a general verdict of guilty. The Court entered judgment on the verdict and sentenced the defendant to five years on Count One and five years on Count Two, the sentences to run concurrently. This appeal followed.

The defendant seeks reversal on the grounds that the trial court erred in overruling his challenge to the array; insufficiency of the evidence to support the verdict; that the opening statement of the United States Attorney to the jury prejudiced defendant's right to a fair trial, and error of the trial court in refusing to grant the defendant a new trial because of false testimony.

The challenge to the array was grounded on alleged illegality in the selection and drawing of the jurors. The defendant attempted to prove that the jury officials failed to select jurors representing a cross-section of the community. The Clerk of the Court was the only witness offered by the defendant to so prove. He testified as to the method employed and stated without equivocation that no economic, social, religious, racial, political or geographical group was excluded. The defendant failed completely to sustain his contention. This was fatal to his challenge to the array. *Glasser* v. *U. S.*, 1942, 315 U.S. 60, 87.

The evidence did show that names of volunteers were included. However, there was no evidence that there were any volunteers on the panel summoned in this case. Even if there were it would not constitute a good ground for a challenge to the array because the entire panel would not be affected. Any legally disqualified juror on the panel could have been eliminated on a challenge for cause. There is no showing that any such challenge was made and overruled by the trial court.

The defendant failed to prove any vitiating defect or irregularity in the selection, drawing or impaneling of the jury and the trial court committed no error in denying the challenge to the array.

The contention of the defendant that the evidence is insufficient to support the verdict must be viewed against the backdrop of certain well settled rules of law. First,

we can not resolve conflicts in the evidence nor inquire into the credibility of the witnesses and are required to sustain the verdict if there is substantial evidence, taking the view most favorable to the government, to support it. *U. S.* v. *Green*, 7 Cir., 1957, 246 F. 2d 155, 157. Second, a verdict of guilty will be sustained if based on more than one count of an indictment and is valid as to any one of the counts. *U. S.* v. *Trenton Potteries Company*, 1926, 273 U.S. 392, 402. Third, a judgment thereon will not be reversed where the sentences on the counts are for equal terms and are to run concurrently. *Maddelin* v. *U. S.*, 7 Cir., 1931, 46 F. 2d 266, 269; *Kramer* v. *U. S.* 9 Cir., 1945, 147 F. 2d 202.

The evidence, when viewed in its aspects most favorable to the government, is that Mae Frances Norwood, also known as Faye Jackson and Louise Young, is a prostitute and that she and the defedant met for the first time at the Pershing Hotel in Chicago several months prior to the trial. Meeting a week or two thereafter, they had drinks together and she decided to be his "girl friend" and that association continued for four or five months. On or about January 30, 1957, after talking with some of her girl friends, she decided to go to Waynesville, Missouri with them. She called the defendant by telephone and asked his permission. He said it was "O.K." with him and he told her to come over to his house and get the money for the trip. She did so and the defendant gave her $15.00. She and Joanne, another prostitute, then went to the Pershing Hotel and got Bertha, another girl who was going with them, and the three of them took an Illinois Central train to Saint Louis, Missouri. After stopping at the house of Bertha's mother in Saint Louis they took the bus to Waynesville and went to the Cactus Club

where she engaged in acts of prostitution that night for which she received $219, of which she gave $195 to the defendant upon her return to Chicago.

On or about February 27, 1957 she and the defendant had a conversation, in the apartment the defendant had for her, concerning her return to Waynesville and she testified "[W]ell, he just told me, at least we were talking about it, going back to Waynesville, because he said there wasn't any money in Chicago, and that was a nice time to go by myself, and he said it would be all right for me to go by myself, and he give me money to go." The defendant gave her $20.00 and she went again committing acts of prostitution for which she received $175. She sent $100 of this amount by Western Union to the defendant from Saint Louis. She later returned to Chicago and had a conversation with the defendant in her apartment. An argument ensued resulting in a fight in which she was hit by a bottle thrown at her by the defendant causing a serious face wound.

The evidence, therefore, establishes that on February 27, 1957, the relationship of prostitute and panderer existed between the Norwood woman and the defendant. The defendant gave the Norwood woman the money to go from Illinois to Missouri by common carrier for the purpose of prostitution on January 30, 1957. She returned to Chicago and gave the defendant $195 of the $219 earned by her acts of prostitution in Missouri. Although we agree that the evidence was insufficient to support the verdict on Count One of the indictment such is not the case of Count Two.

The jury had the right to draw the inference from the conversation of February 27, 1957 that what the defendant was talking about was that "there wasn't any money in

Chicago" in her business of prostitution. There is no other reasonable inference to be drawn. She went to Waynesville, Missouri immediately thereafter on the money furnished by the defendant for the purpose of prostitution.

The evidence proves that the Norwood woman went from Chicago, Illinois to Waynesville, Missouri as charged in Count Two of the indictment and that she did so because of the defendant's express desire and inducement. Webster's New International Dictionary, Second Edition Unabridged 1958, defines induce to lead on; to influence; to prevail on; to move by persuasion or influence. The defendant induced her to go for the purpose of prostitution and furnished the money therefor. The proof, therefore, was sufficient to justify the submission of the issue on Count Two of the indictment to the jury. *U. S.* v. *Barton*, 2 Cir., 1943, 134 F. 2d 484.

The defendant complains of portions of the opening statement to the jury by the United States Attorney whereby he claims he was prejudiced in his right to a fair trial. In his opening statement Mr. Connelly, the prosecutor, told the jury what he believed the evidence would show and it did not do so in some particulars. It has been held that the failure of the district attorney to sustain his opening statements could not be prejudicial to the defendant but rather to the government. *Nichamin* v. *U. S.*, 6 Cir., 1920, 263 F. 880.

In his summation to the jury counsel for the defendant said:

> "He has a right to say what he thinks the evidence might disclose, but you can't convict a defendant on the prosecutor's opening statement. You must find your verdict solely upon the evidence that was introduced in this case, and what does the evidence show?

> Mr. Connelly, and I think he is a very fine gentleman, as he is fair and has done the best he could with what I think is a very bad case for the government, * * *."

The defendant is in no position to now contend that the prosecutor was unfair or was acting in bad faith. The record is to the contrary. Counsel for the defendant said in open court that the prosecutor was fair and had the right to do the very thing about which the defendant would now complain. Under such circumstances we cannot say that the declarations, admittedly made by the prosecutor in good faith, amounted to misconduct and constituted reversible error. *U. S.* v. *Lanza*, 2 Cir., 1936, 85 F. 2d 544; *U. S.* v. *Moran*, 2 Cir., 1952, 194 F. 2d 623.

The remaining contention of the defendant that "the court erred in refusing to grant defendant a new trial where it was shown that the government's witness committed perjury" completely collapses because the ineffectual affidavit of Faye Jackson does not in any manner show that her testimony should be discredited.

A motion for new trial is addressed to the sound discretion of the trial court and its action thereon will not be reviewed on appeal except in the case of a clear abuse of such discretion. *Apodaca* v. *U. S.*, 10 Cir., 1951, 188 F. 2d 932; *Adams* v. *U. S.*, 9 Cir., 1951, 191 F. 2d 206.

The trial judge heard the evidence introduced at the trial and had before him the affidavit attached to the supplementary motion for new trial. Counsel for the defendant informed the Court on the hearing on the motion for new trial that "I feel as Mr. Connelly does that these recantations are to be looked upon with suspicion." Even if the affidavit had stated a clear denial of the affiant's testimony the trial judge said in denying a new trial:

"If I were not sure that the jury were right I would give him a new trial, but I am sure they were right. I am sure that he is living off the earnings of this woman, and I am sure that he induced her to change her story."

We are satisfied that the trial court did not abuse its discretion and committed no error in denying the defendant a new trial.

The judgment as to Count One of the indictment is reversed and as to Count Two of the indictment the judgment is affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

JUN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 985

GRANT W. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petitioner's Reply to Brief in Opposition

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---

Petitioner's Reply to Brief in Opposition

The government's brief does not satisfactorily answer our contention that the method of selection of jurors in the petitioner's case deprived him of a trial by a jury fairly representative of the community. In our reply we shall deal with those portions of the government's argument which require an answer.

The petition challenging the array of the petit jurors alleged that at another trial in the same District at a similar hearing*, the evidence disclosed the following:

During the years 1954, 1955 and 1956, the Clerk of the United States District Court sent letters requesting names for prospective jurors to three churches composed of Negro membership only and to four small town postmasters. During the period from 1950 to 1957, the clerk selected jurors from eight lists of names totaling approximately one thousand names. He was unable to state how old these lists were. In addition to these lists, he accepted as jurors persons recommended by former jurors, volunteers, and those recommended by the personnel of the office of the United States Attorney. Although the population of the Northern District of Illinois exceeds six million persons, jury panels are selected from a list of prospective jurors never exceeding two thousand names. The government failed to answer the petition.

The evidence introduced on the hearing on the motion challenging the array of the petit jury in the present case supported the allegations contained in the petition. The testimony of the clerk showed that approximately sixty percent of all persons selected by the clerk to serve as jurors were chosen by recommendation of former jurors, postmasters and volunteers, and the balance of the jurors came from certain special lists. The clerk also testified that he had in the past written to various churches, labor organizations, fraternal organizations and parent teachers associations for names of prospective jurors, but that these organizations did not always answer. He made no further effort to communicate with those organizations that failed to respond, with the exception of the Chicago Urban League.

---

*United States of America v. Daniel Considine, et al., No. 54 CR 585. The defendants were acquitted.

The testimony of the clerk shows clearly that jurors were chosen from a limited sphere. For if one were not a church member, an Elk, a war veteran, a member of a union or a member of a parent-teacher's association, he would be excluded from jury service. Names of prospective jurors selected in this manner did not constitute a true cross section of the community. The clerk in asking these groups to furnish him with names to be used for prospective jurors, improperly delegated the duty of jury selection to others.

The evidence shows that the organizations from which the clerk selected names of prospective jurors were less than the number stated by the government in their brief. The record shows that although the clerk may have written to various organizations for names, he made his selections merely from lists of parents of students of parochial schools, members of St. Kilian's Society and parent-teachers' associations, given to him by his secretary and wife. (R. 12)

No matter how the government in its argument may stretch the number of the groups from which the clerk selected jurors, the fact remains that unless one did belong to a particular association and his name was selected by some one connected with this association, he would not be called for jury service. This vicious practice perpetuates itself through the system of recommendations of jurors previously chosen from a small select portion of the population.

The government fails to answer our contention that the use of volunteers for jury service which is prohibited by the State of Illinois and punishable as contempt of court, deprived the petitioner of a fair cross section of the population. The use of volunteers is a method which is

capable of harboring much evil. It would permit organizations that may have a particular interest in certain litigation to volunteer in such numbers as to improperly weigh the number of names in the jury box.

It is argued by the government that any legally disqualified juror could have been challenged for cause. This statement which is taken from the opinion of the Court of Appeals in this case thereby admits that a volunteer juror is disqualified from serving on the jury. The objection to the venire on the grounds that a large number of jurors were volunteers was known to the trial court but he nevertheless denied the challenge to the array. It is therefore unlikely that the trial court would have permitted a challenge for cause to any volunteer juror.

The government's reasoning is contrary to the holding of this court in the case of *Thiel* v. *Southern Pacific Company*, 328 U.S. 217 where it was held that it is immaterial that the jury which actually decided the factual issue in the case conformed or did not conform to the requirement that it represent a true cross section of the community, the evil lies in the wholesale exclusion of the majority of the population of the district from jury service.

Respectfully submitted,

CHARLES A. BELLOWS,
Attorney for Petitioner.

JASON ERNEST BELLOWS,
On the Brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

GRANT W. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (3 R. 1-6; Pet. App. I, 1-7)[1] is reported at 253 F. 2d 95.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1958 (3 R. 7), and a petition for rehearing was denied on April 8, 1958 (3 R. 8). The petition for a writ of certiorari was filed on May 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The designations "1 R.", "2 R.", and "3 R." refer, respectively, to the Appellant's Appendix, the Appellee's Appendix, and the bound copy of opinion and judgments certified by the clerk below.

QUESTION PRESENTED

Whether petitioner's challenge to the array of the jury was valid.

STATUTES INVOLVED

28 U.S.C. 1861:

> Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:
>
> (1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> (2) He is unable to read, write, speak and understand the English language.
>
> (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.
>
> (4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

28 U.S.C. 1864:

> The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.
>
> The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.
>
> Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall re-

ceive $5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

STATEMENT

The petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit (3 R. 7) affirming the judgment of the District Court for the Northern District of Illinois, as to the second count of an indictment, adjudging petitioner guilty, upon the verdict of a jury, of violation of 18 U.S.C. 2422 by inducing a woman to go from Illinois to Missouri on February 28, 1957, for the purpose of prostitution (1 R. 10-11). The petitioner was sentenced to five years' imprisonment (1 R. 10). The petitioner complains of the disallowance of his motion challenging the array of petit jurors (1 R. 3, 6-10).

At the hearing on the motion, held prior to trial on June 10, 1957 (1 R. 3), the Clerk of the District Court testified to the following: He and the jury commissioner, Crooks, placed an equal number of names of jurors in the jury box (1 R. 12; 2 R. 1).[2] To obtain names for the 50% selected by the Clerk, he wrote for lists of prospective jurors to Catholic, Jewish, and Protestant churches, Negro churches, labor unions, veterans' organizations, parent-teachers' associations, women's clubs, Rotary, Lions, Elks, and Odd Fellows

---

[2] Commissioner Crooks was ill and did not testify (1 R. 12). Petitioner makes no complaint in this Court as to the 50% of the names provided by Commissioner Crooks.

clubs, Postmasters, the Urban League, the Y.M.C.A., St. Kilian Society and Catholic Parochial school (1 R. 12; 2 R. 1). He also used names recommended by previous jurors, volunteers, and acquaintances of the Clerk (2 R. 1). He did not have personnel sufficient to take names from the polling lists and directories (1 R. 13). He received answers from some of the organizations to which he wrote, and did not repeat his requests of those who failed to respond, except in the case of the Chicago Urban League (1 R. 13).

Of questionnaires sent out by the Clerk, several thousand, to the best of his recollection, were returned to him in 1956 (2 R. 2). The Clerk stated, as a guess, that 50 to 60 per cent of the names added in 1956 was made up of volunteers and persons recommended by former jurors or friends (1 R. 12-13; 2 R. 2). Since 1942, only three names submitted by employees of the United States Attorney's office were used, two of these in 1957 (1 R. 13; 2 R. 2). There was no evidence that there were any volunteers on the panel summoned in the instant case (3 R. 2; Pet. App. 2).

The Clerk always had a surplus of names, and envelopes full of lists from which the names of prospective jurors were drawn (2 R. 1). However, on January 1, 1957, when he was short of Negro names he wrote to Negro churches to maintain racial balance (2 R. 2). During the year 1956, his only requests for names had been directed to three or four Negro churches and some postmasters of the district (1 R. 12). During 1956, he received several thousand questionnaires (1 R. 12). He received 40 or 50 names from the Negro churches, 100 to 200 names from the postmasters, and perhaps 500 names recommended by previous jurors (1 R. 12).

In 1957, the Clerk wrote to more Negro organizations, mostly churches. He did not write to churches of white membership, and did not recall whether he wrote to any postmasters from January to May of 1957. The names of jurors drawn to serve for June 1957 were drawn from the 50% of the names deposited by the Clerk (1 R. 13).

From the lists of names on hand, those to be placed in the jury box were selected in various ways—alphabetically, by latest date on the questionnaire, and by selecting every 5th or 20th questionnaire. Geographical balance was maintained; Chicago was not broken down on a neighborhood basis but as to the rest of the county representation was effected by selecting one or two jurors from each different town (2 R. 1).

1,934 names were deposited in the jury box in 1956. 450 names and 514 names, respectively, were deposited on April 8, 1957, and May 8, 1957. At the time of the drawing in June, 1957, there were 1,402 names in the box (1 R. 12).

In placing names in the jury box there was no indication of the list from which the name was taken and no class was excluded because of religion, race, wealth, education, or for social, political or geographical reasons (1 R. 13; 2 R. 2).

The petitioner's motion challenging the array was disallowed (1 R. 3). The Court of Appeals, adverting to the evidence as to the method of selection and the unequivocal testimony that no economic, social, or other group had been excluded, held that no vitiating defect or irregularity had been disclosed (3 R. 2; Pet. App. 2).

ARGUMENT

The petitioner's challenge of the jury array was properly disallowed. His sole basis of challenge was the testimony of the Clerk of the District Court, who supplied the names of 50% of the prospective jurors. The petitioner did not challenge the methods as to the other half, and his efforts to elicit indications of fatal defects from the Clerk's testimony are clearly unavailing.

1. The Clerk disclosed diligent efforts to obtain the broadest practical base for lists of jurors by solicitation of such lists from a cross-section of church, labor, veterans', parent-teachers', women's, and civic organizations, and from previous jurors, volunteers, and people known to the Clerk. His specific attention to Negro organizations was a proper safeguard against possible insufficient representation of the Negro group, rather than an improper weighting, as implied by petitioner. The Clerk's testimony was, as characterized by the Court of Appeals, "without equivocation", not only in the direct statement that no economic, social, religious, racial, or political or geographical group was excluded (3 R. 2; Pet. App. 2), but as well in the description of the methods employed. Comparable problems of general procedure were extensively discussed and approved in *United States* v. *Dennis*, 183 F. 2d 201, 217-218, 220-224 (C.A. 2), affirmed, 341 U.S. 494. *Inter alia*, the court there said (pp. 217-218):

> * * * Since the defendants have the burden, we shall do no injustice if we assume that no more than 3,000 of the 13,000, as the list stood in 1948, had been suggested by the [Federal Grand Jury] Association. The clerk was free to call all these persons if he wished; he had no reason to reject

them; at most his only mistake was that he allowed others to suggest them to him; and, as we shall show, that was not unlawful, for he was free to go to any source for persons to call. The only question is whether they so weighted the list as a whole as to make it an improper source for the panels drawn in the case at bar. Glasser v. United States, [315 U.S. 60], supra, did not condemn the practice of accepting suggestions from groups such as the Association; what it did condemn was calling from any one group—women in that case—members of a single association only. * * *

And see *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 425-427 (C.A. 3), certiorari denied, 350 U.S. 971, the court stating (pp. 426-427):

> * * * First, as we have said, the burden of proving wrongful exclusion is upon the party attacking the validity of the system, and this of course means that the plaintiff must show that the methods used were not reasonably designed to obtain representative lists. In many instances, such as those involving religious groups, the plaintiff in substance has shown only that the officials did not solicit religious sources directly for religious representation. However, to establish neglect of duty on the part of the jury officials, the plaintiff must show that a proper representation of cognizable religious groups could not reasonably be expected to have been obtained by a random solicitation from the other sources utilized.
>
> * * * The jury officials could in the exercise of their discretion resort to others for the suggestion of names so long as it could reasonably be expected that a cross-section would thereby be obtained.

and using the names taken from such a variety of sources does not result in an unlawful delegation of duty by the officials. The Supreme Court in the Glasser case, supra, did condemn the taking of names of any group from only one private organization. But here many sources were utilized, and there is no showing that any one source was so relied on that it improperly weighted the list. * * *

2. The petitioner seeks support in an Illinois statute providing that one volunteering as a juror shall be fined not to exceed $20 and shall "be disqualified from serving as a juror for sixty days thereafter."[3] The short answer to this contention is that there is no evidence of the selection of any volunteer juryman within 60 days of his offer to serve. As noted by the Court of Appeals, "Any legally disqualified juror on the panel could have been eliminated on a challenge for cause. There is no showing that any such challenge was made and overruled by the trial court" (3 R. 2; Pet. App. 2).

Moreover, the point is no longer of general significance, since the former requirement (*supra*, p. 2, par. (4)) that a federal juror be competent under State law has been eliminated (71 Stat. 638, Sept. 9, 1957).

---

[3] Ill. Rev. Stat. (1957) c. 78, Section 13. "*When regular panel exhausted—Seeking to be juror or to get person on a jury.* * * * Any person who seeks the position of a juror, or who asks any attorney or other officer of the court or other person to secure his selection as a juryman, shall be deemed guilty of a contempt of court, and be fined not exceeding twenty dollars ($20), and shall thereby be disqualified from serving as a juror for sixty days thereafter, and such fact shall be sufficient ground for challenge. * * *"

CONCLUSION

The judgment below is a correct disposition of a particular factual problem upon established principles, and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JUNE 1958.

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